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Activist Profiles & Playbooks

Wednesday, February 9, 2022

"Activist Profiles & Playbooks"

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2:00 – 3:00 pm, Eastern [archive and transcript to follow]

The ongoing M&A boom, the bumper crop of newly public companies resulting from the SPAC phenomenon, and increasing market volatility provide activists with a target rich environment in 2022. That makes it even more important to identify who the activists are - and what makes them tick. Join these experts:

- **Anne Chapman**, Managing Director, Joele Frank
- **Bruce Goldfarb**, President & CEO, Okapi Partners
- **Damien Park**, Managing Director, Spotlight Advisors LLC
- **Dan Scorpio**, Managing Director, Abernathy MacGregor

Topics for this popular annual webcast include:

- What are the lessons from 2021's activist campaigns?
- What can companies expect from activists during this proxy season?
- What are key vulnerabilities and opportunities that activists will target?
- Who are the activists, and what are their strategies?

"Activist Profiles & Playbooks"

Course Outline / Notes

1. What are the lessons from 2021's activist campaigns?

2. What can companies expect from activists during this proxy season?

3. What are key vulnerabilities and opportunities that activists will target?

4. Who are the activists, and what are their strategies?

“Activist Profiles & Playbooks"

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2021 Activism Developments:
Course Materials for "Activist Profiles & Playbooks" Webcast

February 2022

Del Chancery Strikes Down "Anti-Activist" Poison Pill

In February 2021, Vice Chancellor Kathleen McCormick issued an 88-page opinion in *The Williams Companies Stockholders Litigation*, (Del. Ch.; 2/21), declaring the company's poison pill unenforceable & permanently enjoining its application. The Vice Chancellor characterized the pill as "unprecedented," with "a more extreme combination of features than any pill previously evaluated by this court."

The Williams Companies adopted its pill in March 2020, during the period of market turmoil following the initial onset of the pandemic. The pill was aggressive, and contained both a 5% beneficial ownership trigger and a broad "wolf pack" provision under which certain shareholders could be regarded as acting in concert in determining whether the pill had been triggered. It also narrowly defined the type of "passive investor" whose ownership would be excluded from triggering the pill.

As with other unilateral defensive measures, the board's decision to adopt the pill was subject to Unocal scrutiny, which requires the board to establish both that it was reasonably responding to a cognizable threat to the corporate enterprise, and that its response was reasonable and proportionate to the nature of the threat. According to the Vice Chancellor, the board's argument was that it adopted the pill in response to three potential threats:

> The first threat was quite general—the desire to prevent stockholder activism during a time of market uncertainty and a low stock price. The second threat was only slightly more specific—the concern that activists might pursue "short-term" agendas or distract management. The third threat was just a hair more particularized—the concern that activists might rapidly accumulate over 5% of the stock and the possibility that the Plan could serve as an early detection device to plug the gaps in the federal disclosure regime.

In assessing these arguments, Vice Chancellor McCormick noted that Unocal requires the board to establish that it is responding to a legitimate threat: "If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat warranted a response, will not be enough to save the board." She noted that the board was not concerned about any specific activist threat and was not acting to preserve an asset like an NOL (which is a common reason for pills with 5% triggering thresholds). Instead, VC McCormick said that the board "was acting pre-emptively to interdict hypothetical future threats."

The Vice Chancellor pointed out that, under Delaware law, directors can't justify their actions by arguing that "without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief." She then characterized generalized concerns about activism as a threat to be a "an extreme manifestation" of this "proscribed we-know-better justification for interfering with the franchise," and therefore concluded that these generalized concerns were not a cognizable threat under *Unocal*.

With respect to the board's second justification for the pill, VC McCormick noted that "reasonable minds could dispute" whether "short-termism" & "distraction" are cognizable threats, but went on to observe that when the board acted, these concerns were merely hypothetical – and that when "untethered to a concrete event," these phrases were nothing but "mere euphemisms for stereotypes of stockholder activism generally." She therefore concluded that these not cognizable threats.

The Vice Chancellor did not rule on whether the board's effort to address "gaps" in the SEC's reporting scheme for beneficial ownership was a cognizable threat under *Unocal*. Instead, she focused on *Unocal's* second prong – the requirement that the board's response be reasonable & proportionate in relation to the threat – in evaluating this third justification. Here, she emphasized the extreme nature of the pill's provisions. In particular, she noted that the board's financial advisor had advised it that only 2% of poison pills had a 5% beneficial ownership trigger, and that this was one of only nine plans outside of the NOL context to ever use that low a trigger. But it wasn't just the trigger provision that the Vice Chancellor found extreme:

> The Plan's other key features are also extreme. The Plan's "beneficial ownership" definition goes beyond the default federal definitions to capture synthetic equity, such as options. The Plan's definition of "acting in concert" goes beyond the express-agreement default of federal law to capture "parallel conduct" and add the daisy-chain concept. The Plan's "passive

investor" definition goes beyond the influence-control default of federal law to exclude persons who seek to direct corporate policies. In sum, the Plan increases the range of Williams' nuclear missile range by a considerable distance beyond the ordinary poison pill.

Ultimately, the Vice Chancellor concluded that the board failed to carry its burden of proving that the "extreme, unprecedented collection of features" contained in the pill were a reasonable means of carrying out the board's objective, and invalidated the pill.

While a decision from the Chancery Court to invalidate a poison pill is a very rare event, the Vice Chancellor's concern about aggressive terms in pills targeting activists shouldn't come as a complete surprise. Vice Chancellor Laster's transcript ruling in the *Versum Materials* case suggested that the members of the Chancery Court were skeptical about whether some of the terms would pass *Unocal* muster.

The Vice Chancellor's opinion leaves a lot of questions about the role that a poison pill may legitimately play in the board's response to shareholder activism, but at the very least, it is likely to prompt companies to take a hard look at how aggressive their pill provisions are. It may also provide yet another reason for companies to keep pills "on the shelf" until such time as a more definitive threat than general concerns about the consequences of activism arises.

Activism: First Quarter Highlights

This Lazard report reviews shareholder activism during the first quarter of 2021. Here are some of the highlights:

- Q1 2021 saw a second consecutive quarter of elevated global activity (53 new campaigns initiated, in-line with Q1 2020 levels) following the pandemic related downturn of mid-2020.

- The significant U.S. rebound continues, with 37 new campaigns (up 48% from Q1 2020 levels) accounting for 70% of all global activity. Q1 2021 U.S. activity is already approaching approximately 50% of U.S. activity for all of 2020. Even with many of Q1 2021's live situations having recently settled, 66 Board seats remain "in play" heading into proxy season.

- In contrast to late 2020's emphasis on mega-cap activity in the U.S., three-quarters of all Q1 2021 activity targeted sub-$10bn market cap companies, including Treehouse Foods (JANA), Kohl's (Ancora, Legion et al.) and eHealth (Starboard and Sachem Head).

- Prominent activists Icahn, JANA and Starboard were among the quarter's most prolific activists (launching 2 campaigns each), while perennially active Elliott launched only 1 new campaign (versus its average of approximately 4 campaigns launched per quarter since 2017).

- 47% of all activist campaigns in Q1 2021 have had an M&A thesis. Attempts to scuttle or sweeten existing deals represented over half of all M&A-driven campaigns, versus 34% historically.

- U.S. ESG equity inflows have continued their torrid 2020 pace to start 2021, with approximately $17bn through February, setting 2021 on a path to far surpass 2020's record inflows of approximately $62bn. "Say-on-Climate" proposals from TCI Fund Management highlight diversifying activist tactics regarding ESG matters, especially in a proxy season where institutional investor votes on E&S proposals will be closely scrutinized.

European activism set records in 2020's 4th quarter, but Lazard says that activity in Europe pulled back slightly, with only 10 new campaigns initiated during Q1. Institutional investors, occasional activists and new / small-cap activists led 9 of 10 new campaigns.

Activism: Bumpitrage in the U.K.

In recent years, U.S. buyers & sellers have become familiar with the strategy of "bumpitrage," in which activists challenge announced transactions and press for a price increase. This Cleary Gottlieb blog says that this strategy has become increasingly prevalent in the U.K. Here's an excerpt:

> One of the most noticeable trends that has emerged in the current boom in UK public M&A activity is the heightened level of target shareholder opposition to bids. This is manifesting itself in a number of ways, including through increased and novel "bumpitrage" campaigns as well as through institutional investors becoming more vocal in expressing their discontent at proposed bids. There appears to be a general feeling among a number of the

largest UK institutional investors that private equity are acquiring UK public companies "too cheaply".

Historically, the key negotiating ground in UK public bids has been with the target board before the public announcement of a firm bid. Once the bidder has reached agreement on price with the target board and obtained its recommendation, this has typically been sufficient to deliver a successful deal in the vast majority of cases, absent an intervention from an activist shareholder or competing bidder.

The blog says that these tactics are paying off & have resulted in bidders increasing their offers in 3 deals in the last few weeks. It also advises that bidders should expect that shareholders will be prepared to actively resist bids that they believe undervalue the target, even if the target board supports the deal.

Activism: 2021 First Half Highlights

This Lazard report reviews shareholder activism during the first half of 2021. Here are some of the highlights:

- 94 new campaigns were initiated globally in the first half of 2021, in line with 2020 levels. Year-over-year stability buoyed by a strong Q1, with Q2's new campaigns launched (39) and capital deployed ($9.1bn) below multi-year averages.

- The first half of 2021 was distinguished by several high-profile activist successes at global mega-cap companies, including ExxonMobil (Engine No. 1), Danone (Bluebell and Artisan Partners) and Toshiba (Effissimo, Farallon, et al.)

- U.S. share of global activity (59% of all campaigns) remains elevated relative to 2020 levels (44% of all campaigns) and in line with historical levels. The 55 U.S. campaigns initiated in the first half of 2021 represent a 31% increase over the prior-year period.

- 44% of all activist campaigns in H1 2021 featured an M&A-related thesis, in line with the multi-year average of 40%. Among all global M&A-focused campaigns in H1 2021, 56% centered on scuttling or sweetening an announced transaction (and accounted for all European M&A-focused campaigns). In contrast, campaigns pushing for an outright sale of the

> company accounted for only 12% of M&A-related campaigns in the first half of 2021, below the multi-year average of 34%.

The report also notes that investor support for ESG campaigns reached an all-time high, with14% of all proposals passed in H1 2021, up from a three-year average of 6%, and that short activism targeting de-SPACed companies has emerged as an increased threat in H1 2021, with prominent short sellers, such as Hindenburg Research, attacking high-profile de-SPACs such as DraftKings, Lordstown Motors and Clover Health.

Welcome to SPACtivism!

Activists are nothing if not opportunistic, and this Sidley memo says that the huge piles of cash currently sloshing around in SPACs are likely to serve as "chum in the water" for activists. This excerpt says that activists may not even wait for the de-SPAC before targeting a SPAC:

> Activism is present at all stages of the SPAC life cycle, but the risk and nature of activism varies depending on the stage. The potential for activism increases immediately after the SPAC's IPO. Before the time a target is found, an activist may attempt to influence the choice of the target. It is also possible that an activist may at the same time have a stake in a potential target company that they wish to be targeted by the SPAC.
>
> The risk of this activism increases as the SPAC approaches its expiration, which has a punitive impact on the sponsor. As a result, the SPAC sponsor is likely to become more desperate and perhaps less discerning in evaluating acquisitions. Activism risk continues after a target is selected during the de-SPAC process. Any time there is a shareholder vote on a substantial economic transaction, there is the potential for an investor to agitate against the deal.
>
> In the late 2000s, there was a wave of activism against SPACs prior to a de-SPAC where activists would purchase shares of a SPAC at a discount with the intent of voting down any proposed merger and redeeming their shares for par value. While current SPAC structures have been modified to deter this specific type of activism, the risk of activism prior to a de-SPAC remains.

The memo also addresses the risks of "SPACtivism" following a de-SPAC transaction, and offers tips on how to prepare for activism both before and after the de-SPAC.

Activism: What Industries Are In The Cross-Hairs?

FTI Consulting recently published its Q2 Activism Vulnerability Report, which provides an overview of the state of play in shareholder activism & ranks the vulnerability of various industries to activist campaigns. This excerpt says that there have been some changes at the top of the list:

> For the first time since the Q3 2020 report, the Utilities sector is not the most vulnerable sector to shareholder activism, as defined by FTI's Activism Vulnerability Screener. Both the Aviation & Airlines sector and the Media & Publishing sector have overtaken the Utilities sector in terms of total vulnerability to shareholder activism. The Aviation & Airlines sector faces continued COVID-19 challenges, as business travel remains depressed when compared to pre-pandemic levels; the near-term future for both business and personal travel remains murky due to the surging Delta variant.
>
> The Regional Banks and Automotive sectors were the largest movers up the vulnerability rankings, each moving up eleven spots. The Real Estate sector, on the other hand, was the largest downward mover in the vulnerability rankings, moving lower by fourteen spots. The S&P Real Estate Select Sector Index is the top performing sector index year-to-date after a challenging 2020 in which it was the second worst performing sector index. The Real Estate sector was particularly stalled by COVID-19 and the ensuing stay-at-home orders but has rebounded as vaccination rates increase and both corporations and citizens return to normalcy.

Activism: Third Quarter Highlights

This Lazard report summarizes shareholder activism during the third quarter of 2021. Here are some of the highlights:

- 123 new campaigns have been initiated globally in 2021 YTD, in line with 2020 levels, but below historical averages. Year-over-year stability primarily driven by a strong start to the year, with Q3 new campaigns launched (29) and capital deployed ($8.5bn) below multi-year averages.

- U.S. share of YTD global activity (54% of all campaigns) remains elevated relative to 2020 levels (45% of all campaigns) and in-line with historical levels. The 66 U.S. campaigns initiated in 2021 YTD represent a 27% increase over the prior-year period.

- After a slow start to the year, Elliott remains the most prolific activist in terms of launched campaigns (12), with six new global campaigns reported in Q3, including Citrix, Toshiba and SSE.

- 73 Board seats have been won by activists in 2021 YTD, below historical average levels. While H1 Board seat activity was stable relative to prior years, only two new Board seats were won in Q3, an unusually low level.

- 45% of all activist campaigns in 2021 YTD have featured an M&A-related thesis, above the multi-year average of 39%. Scuttling or sweetening an announced transaction remained the most prominent M&A demand, accounting for 53% of such campaigns YTD.

The report also says that, despite increasing regulatory scrutiny of investor statements about how ESG considerations are integrated into their investment strategy, money continued to pour into ESG funds during Q3. If you find the prospect of those ESG investors listening to the siren song of activist hedge funds unsettling, check out this CFO Dive article, which has some tips for companies worried about the rising tide of ESG-based activism.

Lazard's report notes that Q3 closed with a bang, with more than 15 new campaigns launched between 9/27 and 10/8. That suggests that 2021's final quarter may be a busy one.

M&A Activism: Assessing the State of Play

M&A activism is on the rise, with 45% of all activist campaigns in 2021 featuring an M&A-related thesis, above the multi-year average of 39%. This recent report from Insightia, Morrow Sodali and Vinson & Elkins takes an in-depth look at the state of play in M&A activism. It addresses both current conditions and potential changes that may unfold in the coming months in the U.S and abroad. This excerpt discusses activists' recent focus on pushing for a higher price in pending deals, rather than seeking a sale or opposing a particular deal outright:

> With some notable exceptions, the most prominent M&A activism over the past year has been reactive. Six years of boards being told to "be your own activist," has ensured that breakups and strategic alternatives rarely go unreviewed – especially now benign financial conditions have boosted CEO confidence. That is just as well, since hardly any deal these days does not face some shareholder arguing for a bump, a block, or a review of how it has been structured.
>
> The trend may be partly circumstantial – a buoyant M&A market with volatile stock prices creates plenty of opportunities. "Some deals didn't look as good as when they were struck, and activists have tried to take advantage," says Bill Anderson, head of raid defense at investment bank Evercore. In addition, take-privates involving cash-rich private equity firms and the potential for rival bidders to jump into deals have also emboldened activists to argue for an increased premium in return for their support, he says.
>
> Unlike two years ago, when a wave of activism hit acquiring companies amid fears of strategic overreach, the current wave of activism mostly aims to improve terms for selling shareholders, rather than block deals outright.

The report also notes that in the U.S., deal opposition is a strategy that requires "high confidence or strong emotion," since U.S. law doesn't provide minority shareholders with a lot of legal advantages. Perhaps that's why many of those involved in oppositional activism are "occasional activists, reacting to events in stocks they already held, or arbitrageurs."

Poison Pills: Del. Supreme Court Leaves Many Unanswered Questions

In November, the Delaware Supreme Court issued a one-page order affirming the Chancery Court's decision invalidating The Williams Companies' "anti-activist" poison pill. This Fried Frank memo says that the Court's laconic decision leaves many questions unanswered:

> The Court of Chancery's decision raised numerous questions that the Supreme Court's brief ruling does not resolve. While some interpreted the lower court's decision as casting doubt on the validity of pills generally except when adopted as a response to an actual, specific threat of hostile activity against the company, we note that the Chancellor's opinion emphasized the "unprecedented" nature of the terms of the Williams pill.

> Most notably, the pill had a 5% trigger (instead of the usual trigger in the range of 10-20% in the context of an antitakeover threat). In addition, the pill had an unusually broad definition of beneficial ownership, an unusually broad acting-in-concert (“wolfpack”) provision, and an unusually narrow exclusion for passive investors.
>
> This combination of features, the Chancellor wrote, was more “extreme” than any pill the court had previously reviewed. The court stressed that the terms were so broad (in particular, with respect to the acting-in-concert provision) as to impinge on the stockholders’ fundamental right to communicate with each other and the company in ordinary ways. Moreover, with respect to the “purely hypothetical” nature of the threat to the company, we would note that there apparently was no corroboration that the board had actually identified even a general threat.

The memo says that the Chancery Court’s decision makes it clear that a board wishing to defend a pill with extreme terms needs to establish a record substantiating its determination that shareholder activism poses a threat to the company. However, the memo identifies the following remaining areas of uncertainty:

- The extent to which a wholly non-specific threat to the company would be viewed as sufficient by the court in the context of a board that had more specifically considered the potential threat.

- To what extent, even in the face of a purely hypothetical threat, a pill with typical, market (rather than “extreme”) terms would be validated by the court.

- To what extent the court, in the face of an actual and specific threat to the company, would accept a pill with “extreme” terms.

- Whether the court would apply the same analysis in the context of a pill directed against hostile takeover activity rather than shareholder activism.

M&A Activism: Sale-Oriented Activism on the Rise?

During the pandemic, most M&A activism has focused on opposing a pending deal or improving its terms, rather than pushing boards to seek a potential sale. This excerpt from this recent Insightia blog says there are signs that activists may shift gears in the upcoming year:

> M&A activity sprinted through the fourth quarter and the turn of the year, with activist investors more determined than ever to capitalize. Based on recent reporting, event-driven activist Jana Partners – a semi-reliable barometer of hedge funds' confidence in dealmaking – could pressure as many as seven companies to sell themselves or parts of themselves in the coming months.
>
> A pro-M&A tilt from activists would signal progress from pandemic-era activism, which has been much more focused on stopping or improving deals that have been struck at low valuations. Yet throughout the past two years, there have been companies pushed into strategic reviews thanks to more sophisticated activist tactics including proxy fights and stalking horse bids. Whether activists take a surgical or broad approach to the M&A market depends on how many companies look vulnerable and how quickly the window for dealmaking is likely to remain open.

Activism: Are Anti-Activist Pills Useless?

Over on The Activist Insight Blog, Josh Black recently discussed Mercury Systems' decision to adopt a shareholder rights plan with a 7.5% threshold in response to an activist campaign by Starboard Value and Jana Partners, whch own 7.3% and 6.6% of the company, respectively. Josh wasn't too impressed:

> Poison pills are little to no deterrent for activists. Starboard and Jana have little incentive to halt their campaigns now and sell the stock and are in no way hindered from nominating directors or winning a proxy fight. Indeed, irritating institutional investors by pushing the boundaries of acceptable practice might put Mercury itself at a disadvantage. Mercury already has an advance notice bylaw, forcing the activists to make their intentions known well in advance of a shareholder meeting. Takeover bids by tender offer are vanishingly rare, and a board should be equipped to deal with standard proposals. The most practical effect is to limit the upside activists can earn by limiting the amount of capital they can invest.

> While Mercury's management offered the standard claim that the pill would allow its board to make informed decisions, Starboard wrote a measured letter to the board asking for the threshold to be raised to 15%.
>
> But the real question is not so much how the pill will affect these campaigns or the ultimate future of Mercury but about the future of poison pills themselves. Perhaps the only reason a lawsuit has not yet been forthcoming is that Mercury is incorporated in Massachusetts, rather than Delaware, and thus benefits from a much more management-friendly legal regime.

Regarding the potential for irritating institutions by pushing the envelope, the blog notes that only five of the 55 non-NOL pills adopted at Russell 3000 companies in 2020 had a threshold of less than 10%, while Mercury's was the only one adopted in 2021.

The blog alludes to the fact that pills targeting activism have recently taken it on the chin in Delaware, but even before the Delaware courts weighed in, some commentators were calling into question the relevance of pills to respond to shareholder activism. Pills may still have a role to play, but in the current environment, a defensive strategy that puts undue faith in a rights plan at the expense of a more comprehensive approach to the challenges of activism is one with a decidedly limited upside.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES STOCKHOLDER LITIGATION	Consolidated C.A. No. 2020-0707-KSJM

MEMORANDUM OPINION

Date Submitted: February 5, 2021
Date Decided: February 26, 2021

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McCORMICK, V.C.

This litigation concerns the validity of a stockholder rights plan, or so-called "poison pill," a device that came to popularity in the 1980s as a response to front-end loaded, two-tiered tender offers. Coercive tender offers of the 1980s were "to takeovers what the forward pass was to Notre Dame football in the days of Knute Rockne,"[1] and a powerful offense required a powerful defense. Of all the defenses developed to fend off hostile takeovers, the poison pill was among the most muscular.[2] These bulwarks gained judicial imprimatur in 1985 when the Delaware Supreme Court upheld a poison pill as an anti-takeover device in *Moran v. Household International, Inc.*[3] *Moran* also established intermediate scrutiny under *Unocal* as the legal framework for reviewing stockholder challenges to poison pills.[4]

Poison pills metamorphosed post-*Moran*. The flip-over feature of the *Moran* pill was augmented by a flip-in feature.[5] After the adoption of state anti-takeover statutes,[6] trigger thresholds crept down from the 20% threshold of *Moran* to 15% and then to 10%

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[1] Robert A. Prentice, *Front-End Loaded, Two-Tiered Tender Offers: An Examination of the Counterproductive Effects of a Mighty Offensive Weapon*, 39 Case W. Res. L. Rev. 389, 392 (1989).

[2] *See generally* Martin Lipton & Erica H. Steinberger, 1 *Takeovers & Freezeouts* § 6.03[4], at 6-58 (L. J. Press 2009); Prentice, *supra* note 1 at 412–13.

[3] *Moran v. Household Int'l., Inc.* (*Moran II*), 500 A.2d 1346 (Del. 1985).

[4] *Id.* at 1357; *see Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[5] *See generally Stahl v. Apple Bancorp, Inc.*, 1990 WL 114222 (Del. Ch. Aug. 9, 1990) (validating flip-in poison pill).

[6] *See, e.g.*, 8 *Del. C.* § 203 (preventing stockholders from engaging in a tender or exchange offer for a period of three years after buying more than 15% of a corporation's stock unless certain criteria are met). *See generally* E. Norman Veasey, Jesse A. Finkelstein & Robert J. Shaughnessy, *The Delaware Takeover Law: Some Issues, Strategies and Comparisons*, 43 Bus. Law. 865, 868 (1988).

in some instances.[7] The pill's initial success engendered mission creep. Originally conceived as anti-takeover armaments, poison pills were redirected to address other corporate purposes such as protecting net operating loss assets.[8] Recently, pills have been deployed to defend against stockholder activism.

The plaintiffs in this litigation challenge an anti-activist pill adopted by the board of directors of The Williams Companies, Inc. ("Williams" or the "Company") at the outset of the COVID-19 pandemic and amid a global oil price war. The Williams pill is unprecedented in that it contains a more extreme combination of features than any pill previously evaluated by this court—a 5% trigger threshold, an expansive definition of "acting in concert," and a narrow definition of "passive investor."

Unocal calls for a two-part inquiry, asking first whether the board had reasonable grounds for identifying a threat to the corporate enterprise and second whether the response was reasonable in relation to the threat posed.[9] The defendants identify three supposed threats: first, the desire to prevent stockholder activism during a time of market uncertainty and a low stock price, although the Williams board was not aware of any specific activist

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[7] *See generally* Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. Rev. 915, 922 (2019) [hereinafter *Anti-Activist Poison Pills*].

[8] *See, e.g.*, *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010) ("*Selectica II*") (validating an NOL pill).

[9] The second prong of *Unocal* looks first to whether the defensive measure is draconian, in the sense of being preclusive or coercive, before addressing whether the measure is in the range of reasonableness. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387–88 (Del. 1995) (quoting *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45–46 (Del. 1994)). In this case, the plaintiffs do not argue that the rights plan is draconian, and thus this decision goes right to the proportionality analysis.

plays afoot; second, the apprehension that hypothetical activists might pursue "short-term" agendas or distract management from guiding Williams through uncertain times; and third, the concern that activists might stealthily and rapidly accumulate over 5% of Williams stock.

Of these three threats, the first two run contrary the tenet of Delaware law that directors cannot justify their actions by arguing that, without board intervention, the stockholders would vote erroneously out of ignorance or mistaken belief. This decision assumes for the sake of analysis that the third threat presents a legitimate corporate objective but concludes that the Company's response was not proportional and enjoins the Williams pill.

I. FACTUAL BACKGROUND

Trial took place over three days. The record comprises 206 trial exhibits, live testimony from four fact and three expert witnesses, deposition testimony from eight fact and three expert witnesses, and one-hundred stipulations of fact. These are the facts as the court finds them after trial.[10]

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[10] The Factual Background cites to: C.A. No. 2020-0707-KSJM docket entries (by docket "Dkt." number); trial exhibits (by "JX" number); the trial transcript (Dkts. 111–13) ("Trial Tr."); and stipulated facts set forth in the Parties' Joint Pre-Trial Order (Dkt. 101) ("PTO"). The following witnesses testified at trial: Plaintiff Steven Wolosky; Defendants Charles I. Cogut, Murray D. Smith, Nancy K. Buese; Plaintiffs' expert Joseph Mills; and Defendants' experts Guhan Subramanian and Bruce Goldfarb. The parties relied on the deposition transcripts of the following witnesses: Williams' Chief Financial Officer John Chandler and Defendants Stephen W. Bergstrom, Vicki L. Fuller, and Murray D. Smith. *See* Dkt. 88, Notice of Lodging of Dep. Trs. Exs. C–G. The deposition transcripts using the witnesses' last names and "Dep. Tr."

A. Williams and Its Board

Williams is a publicly traded Delaware corporation with its headquarters in Tulsa, Oklahoma.[11] It owns and operates natural gas infrastructure assets, including over 30,000 miles of pipelines and 28 processing facilities, and handles approximately 30% of the nation's natural gas volumes.[12]

At all times relevant to this decision, there were approximately 1.2 billion shares of Williams common stock outstanding. Based on the stock's trading price from March 2020 through the time of trial, Williams' market capitalization ranged from approximately $11.22 to $27.54 billion. About 50% of Williams' outstanding shares are owned by approximately twenty institutional investors.[13] Williams' largest three stockholders—Blackrock, Vanguard, and State Street—collectively hold almost a quarter of the Company's common stock.[14]

Williams' certificate of incorporation establishes a straight Board of Directors (the "Board") and provides "that directors shall be elected annually for terms of one year."[15] Williams stockholders have the right to remove directors without cause and to act by written consent.[16]

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[11] PTO ¶ 14.

[12] JX-32 at 5; PTO ¶ 14.

[13] JX-156 ("Goldfarb Report") ¶¶ 22–24.

[14] Goldfarb Report ¶ 24. Each of BlackRock, Vanguard, and State Street filed a Schedule 13G with the SEC in connection with its stake in Williams. *Id.*

[15] JX-8 Art. FIFTH ¶ B, at 28 (May 20, 2010 Form 8-K).

[16] *See id.* ¶ C, at 28 (stating that the "stockholders shall not have the right to remove any one or all of the Directors except for cause and by . . . affirmative vote," but then stating

As of March 2020, the Board comprised twelve members—CEO Alan Armstrong and eleven outside directors. The complaint names as defendants Armstrong and ten of the outside directors—Stephen W. Bergstrom, Nancy K. Buese, Stephen I. Chazen, Charles I. Cogut, Michael A. Creel, Vicki L. Fuller, Peter A. Ragauss, Scott D. Sheffield, Murray D. Smith, and William H. Spence (collectively, the "Director Defendants").[17]

B. Williams' Prior Experience with Stockholder Activism

In late 2011, Soroban Capital Partners LLC (led by Eric Mandelblatt) ("Soroban") and Corvex Management LP (led by Keith Meister) ("Corvex") each acquired slightly less than 5% of Williams stock.[18] Through a February 2014 agreement with Williams, Mandelblatt and Meister joined the Board.[19]

During their tenure, Mandelblatt and Meister were instrumental in pressing for a merger with Energy Transfer Equity LP.[20] After the merger was terminated, six of the Board's thirteen members—including Mandelblatt and Meister—attempted to remove and

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that "[t]he first sentence of this Paragraph C, shall be of no force and effect after the annual meeting of stockholder [sic] in 2013"); *see also* PTO ¶ 109 ("Williams' By-laws permit stockholders to remove members of the Board of Directors by written consent.").

[17] Dkt. 1, Unsworn Verified Compl. for Decl. and Inj. Relief ("Wolosky Compl."); JX-60 at 10–11, 16; PTO ¶¶ 15–25. The eleventh outside director, non-party Kathleen Cooper, retired from the board and is not a defendant. JX-60 at 16; Trial Tr. at 308:8–11 (Smith).

[18] PTO ¶ 27; JX-104; Trial Tr. 309:17–310:8 (Smith); Bergstrom Dep. Tr. 37:6–38:6.

[19] PTO ¶ 29.

[20] Smith Dep. Tr. 9:13–18, 87:7–88:14; Chandler Dep. Tr. at 104:23–105:11; Fuller Dep. Tr. at 83:7–9.

replace Armstrong as CEO.[21] When this effort failed, those six directors resigned.[22] Meister then threatened a proxy fight to replace the entire Board,[23] but he agreed to stand down when Williams named three new independent directors—Bergstrom, Sheffield, and Spence.[24] Bergstrom became Chair.

Management also underwent significant change. Armstrong remained as CEO, but the Company hired several new executives, including CFO John D. Chandler and General Counsel T. Lane Wilson.[25]

Armstrong and Smith are the only two Director Defendants who served on the Board during the Soroban and Corvex era; the others joined the Board in either 2016 or 2018.[26] Smith found Soroban and Corvex's activism detrimental to the Company.[27] Smith further felt that Soroban and Corvex pushed for short-term-value-enhancing agendas that were not aligned with the Board's long-term goals.[28]

C. Williams Stock Price Plummets

Before 2020, Williams stock price traded at a high of $24.04 and had been relatively stable over the preceding months. In early 2020, however, the COVID-19 pandemic and

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[21] PTO ¶ 30.

[22] *Id.*; Trial Tr. 312:7–23 (Smith).

[23] PTO ¶ 31; Trial Tr. 312:24–313:11 (Smith).

[24] PTO ¶ 31; Trial Tr. 313:12–19 (Smith); *id.* at 129:15–20 (Cogut).

[25] Trial Tr. 136:14–138:10 (Cogut); *see* JX-162 at 1–3.

[26] PTO ¶¶ 15–25 (listing the Director Defendants and the year in which each joined the Board).

[27] *See, e.g.*, Trial Tr. at 311:7–16, 314:1–17, 349:14–350:20 (Smith).

[28] *Id.* at 311:10–16 (Smith).

the ensuing oil price war between Saudi Arabia and Russia shocked the oil market and sent stock prices plummeting.

The COVID-19 pandemic hit first. On January 31, 2020, the Department of Health and Human Services "declared a public health emergency in response to the COVID-19 pandemic."[29] Williams stock price fell to $18.90 by the end of February 2020.[30] During this period, trading volume in Williams stock was high and fluctuated dramatically from day to day, indicating "a lot of unusual and short-term-type trading."[31]

The Board met on March 2, 2020, to discuss solutions for the declining stock price. Management and representatives from Morgan Stanley explained that the stock was approaching lows similar to those in 2010 and 2016, despite the fact that earnings were 25% higher and the Company was carrying significantly less debt.[32] The Board discussed a share repurchase program but opted to preserve liquidity and continue to de-leverage instead.[33]

Then came the oil price war. On March 8, 2020, Saudi Arabia cut prices in reaction to Russia's conduct at a March 2020 meeting of the Organization of the Petroleum

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[29] PTO ¶ 34.

[30] *Id.* ¶ 36.

[31] Trial Tr. 538:19–539:1 (Buese).

[32] JX-34 at 1–2; JX-35 at 4 (noting that the Company's stock price was "approaching lows realized in 2010 and 2016 despite 25% higher earnings and >1 turn less of leverage during other market stresses").

[33] PTO ¶ 37; JX-34 at 1; JX-35 at 3–4; Trial Tr. 140:14–141:20 (Cogut); Chandler Dep. Tr. at 203:21–204:4; Fuller Dep. Tr. at 278:16–280:13; Bergstrom Dep. Tr. at 216:11–16.

Exporting Countries.[34] The following day energy stocks "fell to their lowest levels in 15 years, dropping 20% in a single day."[35] Williams stock price closed at $14.99 on March 9, 2020.[36] By March 19, Williams stock price had fallen to approximately $11, which was close to a 55% decline since January 2020.[37]

D. Cogut's Plan

Around early March 2020, outside director Cogut conceived of an alternative to the repurchase program—a stockholder rights plan (the "Plan").[38] Cogut, a retired lawyer who had led the M&A and private equity practices of a prominent New York law firm, had joined the Board in 2016.[39] Cogut had helped clients adopt rights plans roughly a dozen times beginning in the 1980s.[40]

Cogut witnessed the evolution of poison pills throughout his career and described them at trial as "the nuclear weapon of corporate governance."[41] He explained his understanding that the poison pill was historically designed to protect companies from

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[34] PTO ¶¶ 38, 83.

[35] *Id.* ¶ 39 (internal quotation marks omitted).

[36] *Id.* ¶ 40; PTO Ex. A.

[37] PTO Ex. A; JX-157 ("Subramanian Report") ¶ 22 & n.48.

[38] A flip-in poison pill generally works as follows: A company issues its stockholders rights that have nominal value unless somebody acquires an amount of shares above a specified triggering threshold, at which point the rights become exercisable, for everyone other than the acquiring persons, into common or equivalent shares worth more than the exercise price. JX-155 ("Mills Report") ¶ 28.

[39] PTO ¶ 19; JX-60 at 27.

[40] JX-60 at 27; Trial Tr. at 53:5–17 (Cogut).

[41] Trial Tr. at 53:18–55:1, 114:10–12 (Cogut).

hostile takeovers and that they originated in response to front-end loaded, two-tier tender offers.[42] Cogut knew that acceptable trigger thresholds had declined from 20% to 15%, with the occasional 10% trigger.[43] As trigger levels shrank, the pills' uses expanded. Cogut observed that companies began using pills to protect their net operating losses ("NOLs") and not just as a takeover deterrent.[44]

Like many Delaware corporations, Williams had an "on-the-shelf" pill (the "Shelf Pill")—a rights plan that the Company could quickly adopt in the event a threat arose. The Board considered a "refreshment" of the Shelf Pill every so often; the last such refreshment took place in October 2019.[45] The Shelf Pill was geared towards a traditional change of control situation.[46] None of the Company representatives could testify as to details of the Shelf Pill other than its existence, though Cogut testified that it likely had a trigger of 15% and certainly greater than 5%.[47]

Cogut was not concerned with a potential takeover or with NOLs.[48] He felt that the "circumstances that existed because of the pandemic" warranted "a different type of pill."[49]

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[42] *Id.* at 53:10–54:4 (Cogut).

[43] *Id*. at 54:15–18 (Cogut).

[44] *Id*. at 55:2–10 (Cogut).

[45] JX-27 at 1; JX-29 at 2.

[46] Trial Tr. at 563:17–564:6 (Buese).

[47] *Id.* at 58:15–59:5 (Cogut).

[48] *Id.* at 64:19–23, 69:12–70:16, 93:16–19 (Cogut).

[49] Trial Tr. at 65:5–8 (Cogut).

The "uncertainty" in the market required a solution that could "insulat[e]" management from activists "who were trying to influence the control of the company."[50]

Cogut suggested a rights plan to Wilson around March 2 when management was considering its share repurchase proposal.[51] Cogut's proposal "was not meant to deal with the same issues as the stock buyback" and was not fully developed—he simply recommended that "the concept [of a pill] should be considered" by management.[52] The goal was to prevent "[a]ny activism that would influence control over the company at an aggregate level above 5 percent."[53]

Cogut made no distinctions among types of activism.[54] He hoped to impose a "one-year moratorium" on activism of any type.[55] To accomplish this goal, he proposed "a shareholder rights agreement with a 5% triggering threshold, a one-year duration, and an exclusion for passive investors."[56]

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[50] *Id.* at 69:8–70:16 (Cogut).

[51] *Id.* at 66:4–10 (Cogut).

[52] *Id.* at 65:19–24, 66:11–67:1 (Cogut).

[53] *Id.* at 70:20–71:5 (Cogut).

[54] *Id.* at 72:21–75:2 (Cogut).

[55] *Id.* at 118:11–18 (Cogut); *see also id.* at 154:22–155:23 (Cogut) ("I thought that the company would be best off if there was a limitation on the ability of opportunistic investors . . . who were interested in influencing control of the company, if there was a limitation on what they could do, limit their voice over this period of uncertainty.").

[56] PTO ¶ 44.

E. Williams Management Proposes the Plan to the Board

After Cogut proposed the Plan, Wilson consulted with Davis Polk & Wardwell LLP ("Davis Polk"), the Company's outside counsel.[57] Davis Polk then revised the Shelf Pill and sent a draft to Wilson on March 11, 2020.[58]

After receiving the draft from Davis Polk, Wilson socialized the Plan among senior management including Armstrong. Cogut expected Armstrong to support the idea because he had "barely survived" Soroban and Corvex's "attempt to get him fired."[59]

Management liked the pill. At the time, Williams Director of Investor Relations & Treasury Brett Krieg had been looking for a way to "monitor the potential emergence of activists in this low price environment."[60]

On March 17, Wilson forwarded a draft pill to Cogut, along with Davis Polk's "explanation of changes."[61] Wilson noted that he, Armstrong, and Chandler were "all supportive of moving forward proactively."[62]

Wilson also asked Cogut to discuss the Plan with Bergstrom, who lacked any experience with poison pills.[63] Cogut emailed Bergstrom to express his "view that [Williams] should adopt a shareholders' rights plan with a 1 year term, a 5% threshold, and

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[57] *See* JX-42 at 1–2.

[58] *Id.* at 1; JX-42; *see also* JX-176 at 1.

[59] Trial Tr. at 137:8–15 (Cogut); JX-40; JX-174.

[60] JX-172 at 3; *see also* JX-171 at 2.

[61] JX-42 at 1.

[62] *Id.*; *see also* JX-175.

[63] Trial Tr. at 75:3–77:17 (Cogut); Bergstrom Dep. Tr. at 29:16–30:7; JX-176 at 1.

an exception for 13g holders."[64] Bergstrom agreed to discuss the Plan with Cogut the following morning.[65]

In the meantime, Armstrong, Bergstrom, and Wilson scheduled an emergency Board meeting to further evaluate Cogut's Plan.[66] Wilson had also advised that holding two meetings would look better; he recommended scheduling a "second board meeting to approve, at least a day later, to show appropriate consideration by the Board."[67]

Cogut and Bergstrom spoke by phone on the morning of March 18.[68] Bergstrom expressed concern about the Plan's novelty. He was wary of the 5% trigger[69] and "had not joined the enthusiasm of management to proceed."[70] During a call later that morning, Bergstrom expressed similar concerns to Wilson.[71]

F. The Board Calls an Urgent Meeting

The Board scheduled its first meeting for the evening of March 18.[72] An agenda distributed to the Board prior to the meeting identified two discussion topics: (i) the Plan, which the agenda gave forty minutes, and (ii) whether to hold the annual stockholder

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[64] JX-41.

[65] *Id.*

[66] JX-176 at 1.

[67] JX-43 at 1; *see also* JX-47 at 1.

[68] *See* JX-41.

[69] Trial Tr. at 79:19–82:20 (Cogut).

[70] *Id.* at 76:14–21 (Cogut).

[71] JX-50; JX-52.

[72] PTO ¶ 46. In the lead up to the meeting, stockholder activism was a topic of discussion in emails between Wilson, Davis Polk, and Morgan Stanley. JX-50; JX-52.

meeting virtually, which the agenda gave twenty minutes.[73] The agenda attached a presentation titled "Rights Plan Overview."[74] The Board did not receive a draft of the Plan before or during the March 18 meeting.[75]

The meeting lasted approximately seventy-five minutes, with most of that time spent on the Plan.[76] Representatives from Davis Polk and Morgan Stanley attended the meeting.[77]

During the meeting, Armstrong and Wilson delivered the presentation.[78] The presentation identified the purposes of stockholder rights plans generally, the mechanics of rights plans, and their dilutive effects.[79]

Management's presentation explained that, generally, rights plans seek to:

- "Discourage unsolicited takeover attempts that do not offer an adequate price to all stockholders or are otherwise not in the best interests of the company and its stockholders;"
- "Discourage or prevent coercive or unfair takeover tactics" such as "acquisitions of control through open market purchases[,] 'street sweeps,'" or "coercive tender offers, including partial and two-tiered tender offers;"
- "Encourage bidders to negotiate with the Board;" and

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[73] JX-54 at 1.

[74] *Id.* at 1–2.

[75] *See* PTO ¶ 55.

[76] JX-55 at 1, 4; PTO ¶ 51; *see also* Trial Tr. at 152:4–7 (Cogut); *id.* at 326:18–327:11 (Smith); *id.* at 551:11–17 (Buese).

[77] JX-56 at 1–2.

[78] Trial Tr. 554:4–9 (Buese); JX-54 at 1.

[79] *Id.* at 3–10.

- "Provide the Board with [the] opportunity to preserve existing, more advantageous strategies or to develop and implement superior alternatives."[80]

The next slide of the presentation explained that, generally, rights plans are not intended to:

- "Prevent all acquisitions;"
- "Deter fully priced and fairly structured offers;"
- "Prevent proxy contests for representation on Board;" or
- "[P]revent a group of unaffiliated hedge funds from acquiring meaningful positions . . . so long as they remain below the threshold."[81]

The presentation went on to identify "the board's duties."[82] It also noted certain "corporate governance matters," including the possibility of negative reactions from Institutional Shareholder Services Inc. ("ISS") and the press.[83]

The presentation did not discuss any proposed features specific to the Plan, although the minutes of the March 18 meeting reflect that the Board discussed a 5% trigger.[84]

In addition, the minutes of the March 18 meeting state that:

- Morgan Stanley "advised that, given the extremely unusual market volatility primarily arising from the uncertainty relating to the coronavirus outbreak and the disproportionate impact on the Company's common stock price . . . a Rights Plan is a valid consideration."
- Morgan Stanley advised that "in light of existing disclosure regimes, and high, volatile trading volumes, before the Company would have any insight

[80] *Id.* at 3.

[81] *Id.* at 4.

[82] *Id.* at 11–15.

[83] *Id.* at 16.

[84] JX-56 at 2.

or knowledge, an opportunistic investor could acquire a sizable position in the Company's common stock."

- Armstrong stated "that the adoption of a Rights Plan would protect and preserve the interests of long-term shareholders."
- The Board discussed "protecting long-term shareholders (especially by exempting all passive investors from the contemplated plan)."[85]

The Board also discussed the "market perception" and the anticipated reaction of its stockholders, the press, and proxy advisory firms to the proposed Plan.[86] The directors concluded that "further explanation to shareholders" could overcome bad publicity given "the one year term and other . . . mitigating factors in respect of any potential negative investor reaction."[87]

Although the Board had not yet seen a draft of the Plan, by the end of the March 18 meeting, the Board had decided to adopt it. Buese stated that the Board had "unanimously" decided that its "fiduciary duty required [it] to take action in light of the significant dislocation of the stock" despite the "risk that shareholders could vote out a director" in response.[88] The only open issues were logistical questions and a formal vote.[89]

As recommended by Wilson, the Board scheduled a second meeting for the following day, the evening of March 19.[90] The Board briefly discussed transitioning its

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[85] *Id.*

[86] *Id.*; JX-53 at 16; Trial Tr. at 550:20–551:10 (Buese); Fuller Dep. Tr. at 49:11–24, 59:13–60:24.

[87] JX-56 at 2; Trial Tr. at 546:11–16 (Buese).

[88] Trial Tr. at 551:4–10 (Buese).

[89] *See id.* at 550:20–551:10 (Buese).

[90] Trial Tr. at 153:4–11 (Cogut).

2020 Annual Meeting of Stockholders to a virtual setting before adjourning for the evening.[91]

G. The Board Adopts the Plan.

Immediately after the March 18 Board meeting, Williams corporate secretary Bob Riley emailed Computershare Trust Company, N.A. ("Computershare Trust") noting that "our Board will tomorrow adopt a shareholder rights plan" and asking to "chat tomorrow about Computershare's role as the rights agent."[92] Later that evening, Riley emailed the agenda and materials for the meeting to the Board, including the Plan.[93]

On the morning of March 19, Williams filed its 2020 Proxy Statement in anticipation of its April 28, 2020 annual stockholder meeting.[94] The Proxy Statement did not disclose that the Board was considering the Plan.[95]

An agenda was sent to the Board a few hours before the meeting.[96] The agenda allocated sixty minutes to "[a]pproval" of a "Shareholder Rights Plan," including: Morgan Stanley's presentation, discussion of the Plan, review of a draft Form 8-K and a Form 8A

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[91] JX-56 at 2–4; Trial Tr. at 83:23–84:3, 152:4–7 (Cogut); *id.* at 551:11–17 (Buese).

[92] JX-58 at 1.

[93] JX-59; PTO ¶ 55.

[94] JX-60 at 4–5.

[95] *See* JX-60 at 7 (listing agenda items but not including information about the Plan).

[96] JX-65 at 1–2.

registration statement, adoption of resolutions approving the Plan, and review of a draft press release.[97]

The email also included a presentation prepared by Morgan Stanley.[98] Buese testified that she reviewed these materials and "touch[ed] base" with Bergstrom and Wilson prior to the March 19 Board meeting.[99] She did not review every detail but focused instead on key terms and provisions.

The March 19 Board meeting began at 6 p.m. with the full Board and representatives from Morgan Stanley and Davis Polk in attendance.[100] The Morgan Stanley team opened the meeting, beginning its presentation with an executive summary of the Plan before turning to "Considerations Regarding a 5% Trigger."[101] The executive summary stated:

> The *key benefit* of a rights plan is to prevent an opportunistic party from achieving a position of substantial influence or control without paying a control premium to other shareholders.
>
> A shareholder rights plan does not deter friendly or hostile M&A; however, an acquiror would be forced to negotiate with the Board.
>
> An activist would be limited in its ability to accumulate a large stake.[102]

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[97] *Id.* at 2. The agenda is dated March 18, 2020. *Id.* Given its distribution on March 19, and the numerous differences from the March 18 agenda, this was likely a typo. *See* Buese Dep. Tr. at 205:10–206:13.

[98] JX-65 at 3; *see* Trial Tr. at 153:12–16 (Cogut); *id.* at 596:18–597:4 (Buese).

[99] Trial Tr. at 552:7–553:6 (Buese).

[100] JX-67 at 1.

[101] JX-65 at 4–5.

[102] *Id.* at 4 (emphasis added) (formatting altered).

The executive summary stated that "campaigns from well-known activists are expected to continue at a reasonable pace in the current market."[103] In connection with this prediction, the presentation stated that:

> The rights plan would deter an activist from taking advantage of the current market dislocation and challenges in monitoring unusual trading patterns that results in a rapid accumulation of a >5% stake.[104]

The presentation displayed a chart signaling an upward trend in stockholder activism and predicting that such activism would not decline as significantly as it did in response to the market downturn of 2008.[105]

As to the trigger, the presentation informed the Board that: (a) only 2% of rights plans had triggers below 10%; (b) 76% of rights plans "set the trigger" between 15% and 20%; and (c) "[n]o precedents exist below 5%."[106] The presentation did not cover any other provisions of the Plan.[107]

Morgan Stanley walked the Board through its generation of an exercise price for the warrants included in the Plan and the impact that triggering the Plan at that price would have on Company stock.[108]

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[103] *Id.*

[104] *Id.*

[105] *Id.* at 8.

[106] *Id.* at 5.

[107] PTO ¶ 57; Chandler Dep. Tr. 146:15–148:3; *see also* Trial Tr. at 553:12–563:1 (Buese).

[108] *Id.* at 6–7.

The Morgan Stanley team concluded its presentation with some general market data regarding exercise price multiples.[109] It further identified a substantial decline in active rights plans among public companies—only 55 at the end of 2019, down from a high of 946 at the end of 2009.[110]

After delivering the presentation, the Morgan Stanley and Davis Polk representatives left the room to allow the Board to deliberate.[111] The minutes indicate that the Board discussed "recent market events and the impact on the Company's stock price."[112]

Cogut confirmed at trial that Morgan Stanley relayed the above information at the March 19 Board meeting. He regarded the information about other rights plan triggers "irrelevant" because "this was not a traditional shareholder rights plan."[113]

Buese recalled that the Board discussed the potential impact the Plan would have on the trading volume of Williams stock.[114] She further noted that the Board revisited "several levels of thresholds" and "the acting in concert concept."[115] Buese also recalled that the Board discussed the "the fact that ISS has a reasonably dim view of rights plans."[116]

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[109] *Id.* at 11–14.

[110] *Id.* at 10.

[111] JX-67 at 1.

[112] *Id.* at 2.

[113] Trial Tr. at 87:22–90:1 (Cogut).

[114] *Id.* at 555:20–556:6 (Buese).

[115] *Id.* at 556:16–557:11 (Buese).

[116] *Id.* at 560:2–11 (Buese).

According to Buese, the Board collectively felt that "outreach and engagement and education" would temper any investor dissatisfaction.[117]

Following discussion, the Board unanimously resolved to adopt a stockholder rights plan "in substantially the form presented at the meeting."[118] The March 19 meeting, initially scheduled to last for one hour, adjourned after forty minutes.[119]

On March 20, 2020, the Company issued a press release that publicly disclosed the Board's adoption of the Plan (the "March 20 Press Release").[120] On March 30, 2020, the Company supplemented the 2020 Proxy Statement to disclose the Plan's adoption (the "March 30 Proxy Supplement").[121]

The Board elected not to subject the Plan to a stockholder vote. Cogut testified that the idea of allowing stockholders to vote on the Plan "was not raised" by Morgan Stanley, Davis Polk, or any of the Board members.[122] At trial, the Director Defendants cited time constraints as an additional consideration,[123] contending that the 2020 Proxy Statement "was at the printer" by the time the Board began discussing the Plan.[124]

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[117] *Id.* at 561:21–562:6 (Buese).

[118] JX-67 at 2; Trial Tr. at 154:14–19 (Cogut); *id.* at 337:5–9 (Smith).

[119] JX-67 at 5.

[120] JX-69.

[121] JX-82.

[122] Trial Tr. at 118:8–119:8 (Cogut).

[123] *Id.* at 563:10–16 (Buese).

[124] *Id.* at 117:24–118:4 (Cogut).

H. The Plan's Features

The Plan will expire at the end of one year and has four key features: (i) a 5% trigger; (ii) a definition of "acquiring person" that captures beneficial ownership as well as ownership of certain derivative interests, such as warrants and options; (iii) an "acting in concert" provision that extends to parallel conduct and includes a "daisy chain" concept (the "AIC Provision"); and (iv) a limited "passive investor" exemption.

While the Plan's features were a focal point of trial, they received little attention during the March 18 and March 19 Board meetings. The Director Defendants confirmed that Board discussions focused almost exclusively on the 5% trigger.[125] Although Buese recalls having discussed the concept of the AIC Provision,[126] other directors testified that the Board was informed only that the Plan would apply to groups of investors but did not review or discuss the actual terms of the AIC Provision.[127] Most directors admitted that they had not even read the key features of the Plan before this litigation began.[128]

The Plan operates in conjunction with regulatory requirements established by federal and state law. Understanding the Plan's features requires a quick refresher of certain of those requirements.

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[125] *See id.* at 329:21–331:5 (Smith).

[126] *Id.* at 548:8–22 (Buese); *see also id.* at 568:8–569:8 (Buese) (testifying that she reviewed the AIC Provision prior to voting on the Plan). *But see* Buese Dep. Tr. at 225:1–228:21 (testifying that she has no recollection of having reviewed the AIC Provision but assumes that she did because it was her "common practice" to review Board materials).

[127] Trial Tr. at 95:17–96:13 (Cogut); *id.* at 345:5–21 (Smith); Bergstrom Dep. Tr. at 254:5–22, 293:6–294:10; Fuller Dep. Tr. at 74:5–77:7, 80:3–21.

[128] Trial Tr. at 87:1–15, (Cogut); *id.* at 345:2–7 (Smith); Bergstrom Dep. Tr. at 253:9–24, 272:6–273:13; Fuller Dep. Tr. at 74:5–77:7, 80:3–21.

- Section 13(d) of the Securities Exchange Act (the "Exchange Act") requires that non-passive investors report "beneficial ownership" of more than 5% of a class of stock but gives investors a ten-day window to report ownership levels using a Schedule 13D form. During that window, the investor is permitted to continue accumulating stock.

- Section 13(d) does not include derivative securities in the definition of "beneficial ownership."

- Section 13(d) aggregates the beneficial ownership of investors who are acting in concert, which under the Exchange Act occurs where "two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer."[129] Section 13(d)'s definition of "acting in concert" does not capture "parallel conduct" (discussed below) nor a "daisy chain" concept (discussed below).

- Section 13(d) excludes "passive investors," defined as persons who acquired "securities in the ordinary course of [their] business and not with the purpose nor with the effect of changing or influence the control of the issuer."[130]

1. The 5% Trigger

The Plan established a trigger threshold of "5% or more."[131] The Plan is triggered, and the rights distributed, on "the close of business on the tenth Business Day after" a "Person" (defined as an individual, firm, or entity)[132] acquires "beneficial ownership" of 5% or more of Williams stock or commences "a tender or exchange offer" that would result in their ownership reaching that threshold.[133] Given Williams' market capitalization in March 2020, triggering the 5% threshold at the time the Plan was adopted would have

[129] 17 C.F.R. § 240.13d–5(b)(1); *see also* Subramanian Report ¶ 41.

[130] *See generally* 17 C.F.R. § 240.13d-1.

[131] JX-69 at 22.

[132] *Id.*

[133] *Id.* at 21.

required an economic investment (sometimes referred to as a "toehold") of approximately $650 million.[134]

2. Beneficial Ownership Definition

The Plan's definition of "beneficial ownership" starts with the definition found in Rule 13d–3 of the Exchange Act, then extends more broadly to include "[c]ertain synthetic interests in securities created by derivative positions," such as warrants and options.[135]

3. The AIC Provision

The AIC Provision deems a Person to be "Acting in Concert" with another Person if:

> such Person knowingly acts (whether or not pursuant to an express agreement, arrangement or understanding) at any time after the first public announcement of the adoption of this Right Agreement, in concert or in parallel with such other Person, or towards a common goal with such other Person, relating to changing or influencing the control of the Company or in connection with or as a participant in any transaction having that purpose or effect, where (i) each Person is conscious of the other Person's conduct and this awareness is an element in their respective decision-making processes and (ii) at least one additional factor supports a determination by the Board that such Persons intended to act in concert or in parallel, which additional factors may include exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel.[136]

Breaking it down, the AIC Provision deems a Person to be "Acting in Concert" with another where the Person: (1) "knowingly acts . . . in concert or in parallel . . . or towards

[134] Subramanian Report ¶ 94.

[135] JX-69 at 3, 19.

[136] PTO ¶ 70; JX-69 at 18.

a common goal" with another; (2) if the goal "relat[es] to changing or influencing the control of the Company or [is] in connection with or as a participant in any transaction having that purpose or effect;" (3) where each Person is "conscious of the other Person's conduct" and "this awareness is an element in their respective decision-making processes;" and (4) there is the presence of at least one additional factor to be determined by the Board, "which additional factors may include exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel."[137] The fourth factor of this definition gives the Board "a great amount of latitude" for making the "Acting in Concert" determination.[138]

The "parallel-conduct" dimension of the "acting in concert" provision (sometimes referred to as a "wolfpack" provision)[139] is a feature of modern pills,[140] as Defendants' expert witness Professor Guhan Subramanian of Harvard Law School and Harvard Business School explained.[141] According to Subramanian, poison pills have always

[137] PTO ¶ 70; JX-69 at 18.

[138] Smith Dep. Tr. at 231:3–21, 248:15–24; Trial Tr. at 96:14–22 (Cogut); Mills Report ¶¶ 67–68.

[139] The phrase "wolfpacks" in this context refers to "a loose association of hedge funds that employs parallel activist strategies toward a target corporation while intentionally avoiding group status under [S]ection 13(d)." Subramanian Report ¶ 45 n.90 (quoting William R. Tevlin, *The Conscious Parallelism of Wolf Packs: Applying the Antitrust Conspiracy Framework to Section 13(D) Activist Group Formation*, 84 Fordham L. Rev. 2335, 2337 (2016)).

[140] Subramanian Report ¶¶ 48–49.

[141] Professor Subramanian is a recognized expert in corporate affairs and has been helpful to this court on many occasions. *In re Starz Appraisal*, 2018 WL 4922095, at *1 (Del. Ch. Oct. 10, 2018). His published work concerning policy questions of corporate law fills the footnotes of many decisions of Delaware courts. *See, e.g.*, *In re CNX Gas Corp. S'holder*

included an acting-in-concert concept. Early poison pills required express agreements, using language that tracked the definitions of a "group," "affiliate," and "associate" under Section 13(d) and Rule 12b-2 of the Exchange Act.[142] Express agreement provisions do not capture so-called wolfpack activism achieved through "'conscious parallelism' that deliberately stop[s] short of an explicit agreement."[143]

The AIC Provision includes a "daisy chain" concept, providing that "[a] Person who is Acting in Concert with another Person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person."[144] Put differently, stockholders act in concert with one another by separately and independently "Acting in Concert" with the same third party.

Litig., 2010 WL 2291842, at *7 n.4, *10 n.5 (Del. Ch. May 25, 2010); *In re CNX Gas Corp. S'holder Litig.*, 2010 WL 2705147, at *11 (Del. Ch. July 5, 2010); *In re MFW S'holders Litig.*, 67 A.3d 496, 501 n.3, 530 n.162 (Del. 2013); *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *22 n.11 (Del. Ch. Dec. 9, 2011); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 840 n.5, 844 n.6 (Del. Ch. 2011); *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1184 nn.44–45 (Del. 2015).

[142] Subramanian Report ¶ 41. Professor Subramanian notes that "under the Hart-Scott-Rodino (HSR) Act, any person wishing to buy more than $94 million of Williams common stock would have to disclose its position," thus imposing a constraint on "activist shareholders' trading of Williams stock well before the Williams Pill became relevant." *Id.* ¶ 96; *see* 15 U.S.C. § 18a. But HSR does not include a group concept and does not apply to the acquisition of nonvoting, derivative securities, such as stock options; the Plan thus casts a wider net than federal antitrust law.

[143] Subramanian Report ¶ 45.

[144] JX-69 at 18.

The AIC Provision does not apply to a public proxy solicitation or tender offer.[145] Persons are not deemed to be "Acting in Concert" solely as a result of soliciting proxies in connection with a "public proxy or consent solicitation made to more than 10 holders of shares of a class of stock" or when soliciting tenders pursuant to a "public tender or exchange offer."[146] While this provision allows stockholders to initiate a proxy contest and solicit proxies without triggering the Plan, it does not exempt routine communications among stockholder before the launch of a proxy contest or tender offer.

The AIC Provision is also asymmetrical. It excludes "actions by an officer or director of the Company acting in such capacities," such that incumbents can act in concert without suffering the consequences of the Plan.[147]

4. The Passive Investor Definition

The Plan carves out "Passive Investors" from the definition of "Acquiring Persons." The Plan defines "Passive Investor" to mean:

> [A] Person who (i) is the Beneficial Owner of Common Shares of the Company and either (a) has a Schedule 13G on file with the Securities and Exchange Commission pursuant to the requirements of Rule 13d-1(b) or (c) under the Exchange Act with respect to such holdings (and does not subsequently convert such filing to a Schedule 13D) or (b) has a Schedule 13D on file with the Securities and Exchange Commission and either has stated in its filing that it has no plan or proposal that

[145] *Id*. (excluding from the AIC Provision Persons "(a) making or receiving a solicitation of, or granting or receiving, revocable proxies or consents given in response to a public proxy or consent solicitation made to more than 10 [stockholders] . . . , or (b) soliciting or being solicited for tenders of, or tendering or receiving tenders of, securities in a public tender or exchange offer").

[146] *Id.*

[147] JX-69 at 18.

> relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company or has certified to the Company that it has no such plan, proposal or intent (other than by voting the shares of the Common Shares of the Company over which such Person has voting power), (ii) acquires Beneficial Ownership of Common Shares of the Company pursuant to trading activities undertaken in the ordinary course of such Person's business and not with the purpose nor the effect, either alone or in concert with any Person, of exercising the power to direct or cause the direction of the management and policies of the Company or of otherwise changing or influencing the control of the Company, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b) of the Exchange Act, and (iii) in the case of clause (i)(b) only, does not amend either its Schedule 13D on file or its certification to the Company in a manner inconsistent with its representation that it has no plan or proposal that relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company (other than by voting the Common Shares of the Company over which such Person has voting power).[148]

This carve-out was intended to ensure that truly passive investors would be exempt from the definition of Acquiring Person under the Plan.[149] Director Defendants testified as to their belief that the definition excludes Schedule 13G filers, defined under the Exchange Act as an investor that "acquired such securities in the ordinary course of his

[148] PTO ¶ 69; JX-69 at 22.

[149] Trial Tr. at 106:11–16 (Cogut); *id.* at 546:20–547:5, 567:11–19 (Buese); Fuller Dep. Tr. at 151:10–153:12; Chandler Dep. Tr. at 270:24–271:2, 286:24–288:23, 302:6–305:7; Bergstrom Dep. Tr. at 272:23–273:2; PTO ¶ 44.

business and not with the purpose nor with *the effect of changing or influencing the control of the issuer*."[150]

As drafted, however, the carve-out is far more exclusive. The definition uses "and" before romanette (iii), which makes the three requirements of the provision conjunctive. Thus, a stockholder must meet all three conditions to qualify as an exempt "Passive Investor."[151] Consequently, the definition excludes *any* investor that seeks to "*direct or cause the direction of the management and policies of the Company*" as provided in romanette (ii) of the definition. The "management and policies" qualifier of the AIC Provision captures a broader range of activity other than the "changing or influencing . . . control" language applicable to Schedule 13G filers.[152]

As most of the defense witnesses testified, this conjunctive language appears to have been a mistake.[153] The intent was for the provisions to present two options: "(i) *or* (ii) and (iii)."[154] Yet, the Board never discussed nor corrected this error.[155]

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[150] 17 C.F.R. § 240.13d-1(b)(1)(i) (emphasis added); *see* Trial Tr. at 106:11–16 (Cogut); *id.* at 566:23–567:19 (Buese); Smith Dep. Tr. at 215:21–216:3, 218:18–219:18; *see also* JX-161 ¶ 46 (Goldfarb Rebuttal Report).

[151] JX-159 ("Mills Rebuttal Report") ¶ 29.

[152] *See* Mills Report ¶¶ 28–33 (describing various forms of stockholder activism).

[153] *See* Trial Tr. at 107:3–109:15 (Cogut); *id.* at 606:9–607:13 (Buese); *see also id.* at 698:21–700:15 (Goldfarb). Subramanian stood out as the sole witness to read the Passive Investor Definition disjunctively, contending that the provision should be read as "(i) *or* (ii) and (iii)." *Id.* at 505:6–506:1 (Subramanian) (emphasis added). When confronted with its language he stood his ground, referring to a conjunctive reading of the provision as "just a red herring." *Id.* at 421:16–423:17, 504:21–506:20 (Subramanian).

[154] Trial Tr. at 505:6–506:1 (Subramanian) (emphasis added).

[155] *Id.* at 110:11–111:21 (Cogut).

Even a disjunctive reading of the Rights Plan's Passive Investor Definition is quite narrow.[156] At the time the Board adopted the Plan, Williams had only three 13G filers in its stock: BlackRock, Vanguard, and State Street.[157] Read disjunctively, the Passive Investor Definition would include at most those three investors.[158]

I. Public Reaction to the Plan

The Board correctly anticipated that the market and stockholders would react negatively to the Plan.[159] Two of Williams' largest stockholders reached out regarding the Plan shortly after its announcement,[160] and ISS recommended in an April 8 report that stockholders vote against Bergstrom's re-election at the Company's annual meeting.

In recommending against Bergstrom's re-election, ISS cited "The board's adoption of a poison pill with a 5 percent trigger is problematic, as it is highly restrictive and could

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[156] *Id.* at 109:11–110:4 (Cogut).

[157] *Id.* at 109:2–7 (Cogut); *id.* at 506:21–507:8 (Subramanian); *see also* Mills Report ¶¶ 37–39 (observing that the Plan's passive investor definition "impedes a wide range of socially beneficial and/or value-enhancing behavior common to many of the largest institutional investors, as well as routine discourse between and engagement among stockholders and management").

[158] Trial Tr. at 506:21–507:8 (Subramanian).

[159] *See* JX-56 at 2 (noting that the Board discussed a "potential negative investor reaction" to the Plan); Trial Tr. at 550:20–551:10 (Buese); *see also* JX-63 (Williams' management and investor relations teams anticipating the negative reaction to the Plan).

[160] *See* JX-73 at 2–3 (Blackrock emailing Krieg the same day that the Plan was publicly announced, stating that the Plan "doesn't look good from an ESG perspective. Has there been approaches? I think shareholders deserve to have transparency into any potential discussions even if they don't make LT [long-term] value creation sense . . . ."); JX-80 at 2–3 (Vanguard emailing Krieg on March 24, 2020, four days after the Plan was publicly announced, asking to "talk with the appropriate company representative about Vanguard's holdings as they relate to your company's Rights Agreement").

negatively impact the market for the company's shares as the market recovers."[161] ISS noted, "the pill was not a reaction to an actual threat – real or perceived – of an activist investor or hostile bidder."[162] ISS further opined that "the board did not appear to consider other alternatives," that "[w]hen ISS asked the company whether it had considered a shorter term, the answer appeared to be 'no,'" and that "[w]hen ISS asked the company whether it had considered adopting a more standard pill with a higher trigger and using its upcoming annual meeting to seek shareholder ratification of its 5 percent plan, the answer appeared to be 'no.'"[163]

After recognizing on April 7, 2020, that "initial votes [were] trending against" Bergstrom due to anti-Plan backlash,[164] Williams launched a stockholder outreach campaign to preserve Bergstrom's seat.[165] Williams engaged proxy soliciting firm Okapi Partners and met with stockholders in an attempt "to turn around some of the votes that ha[d] been cast and shore up the vote."[166]

On April 14, 2020, Williams management held an investors call. The talking points and agenda addressed the Plan's adoption:

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[161] JX-91 at 15. Williams and ISS had communicated regarding the Plan between March 24 and April, and ISS shared a draft of its report with Williams on April 1.

[162] *Id*. at 16.

[163] *Id*. at 18.

[164] *Id.* at 1.

[165] *Id.*; JX-88; JX-90.

[166] JX-91 at 1; *see also* JX-108 (April 13, 2020 email from Wilson detailing a stockholder engagement game plan).

- Their stated "Rationale for Adoption" was to "[p]revent an opportunistic party from achieving substantial influence or control without paying a control premium to other stockholders."[167]

- They selected the 5% threshold because with "stock market prices so dislocated from fundamental values, a threshold above 5% would allow enormous accumulations by non-passive investors (all passive investors are exempt)" and because of the Company's "recent past experiences with activism," when "Corvex and Sorobon [sic] owned, either as beneficial owners or as economic interest owners, 9.96% of the Company's outstanding shares. Neither owned more than 5%."[168]

- "Many activist campaigns are conducted at levels below 10% ownership; a level higher than 5% simply does not protect a company against an opportunist."[169]

- "The Rights plan is intended to . . . reduce the likelihood of those seeking short-term gains taking advantage of current market conditions at the expense of the long-term interests of stockholders, or of any person or group gaining control of Williams through open market accumulation or other tactics without paying an appropriate control premium."[170]

- The Board selected a one-year duration because "[n]o one can predict the duration of the current crisis and the Board wants the management focused solely on the business, which the Rights Plan is intended to facilitate."[171]

In handwritten notes made to a print-out of the investors call agenda, Chandler wrote: "limited scope → just activist."[172]

Wilson circulated the talking points and agenda to Bergstrom and others on April 14. In response, Bergstrom wrote:

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[167] JX-187 at 3.

[168] *Id.*

[169] *Id.* at 6.

[170] *Id.*

[171] *Id.* at 7.

[172] *Id.* at 1.

> Only thing is [sic] would add is we saw a 50 plus percent in stock price and a minimal decline in cash flow and business fundamentals. We don't talk about how our business didn't change. I use the term you have heard of throw the baby out with the bath water. In our case they threw the bathtub out as well. That is why we put it in place at that level because that is exactly the kind of situation people with bad intentions look for. Dislocation in market where fundamentals are incongruent with that situation.[173]

Williams gave a slide presentation during the April 14 investors call and disclosed the presentation the next day as a proxy supplement (the "April 15 Proxy Supplement"). The presentation stated that the disclosure was intended to explain "the Board's rationale for adopting the [Plan], the [Plan's] key terms, the Board's process in adopting the [Plan], and [the Company's] corporate governance practices generally."[174] It stated:

- "Our Board adopted a Rights Plan on March 19, 2020 after careful consideration. This action was taken: [i]n light of unprecedented market conditions and severe market declines [and] [i]n the best long-term interest of our stockholders."

- "Rationale and purpose of adoption: To prevent an opportunistic party from achieving substantial influence or control without paying a control premium to other stockholders."[175]

- "Company experience in recent past reinforced Board's view that 5% is the right threshold in this environment."[176]

At the April 28, 2020 annual meeting, the stockholders re-elected Bergstrom to the Board, but by a slim margin—only 67% of the shares were cast in favor of Bergstrom.[177]

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[173] JX-114 at 10–11.

[174] JX-117 at 3.

[175] *Id.* at 5 (formatting altered).

[176] *Id.* at 7.

[177] Mills Report ¶ 76; JX-123 at 2.

As Director Chazen noted shortly after the vote, "no one should take great solace from the voting results," as "[a] third of the vote against [Bergstrom] is much larger than I would have guessed."[178] Fidelity Investments, which voted in support of all directors, emailed the Company to note that its support was cautionary: "I would encourage you to put the pill up for a shareholder vote next year if it is extended or we likely will hold directors accountable."[179]

J. The Board Fails to Redeem the Plan.

The Board has the authority to redeem or amend the Plan, but it remains in place.[180]

At trial, Buese offered one reason for why the Board did not redeem the Plan. She speculated that doing so could send a signal "that the board believed we have achieved full and fair value for the share price," effectively setting "an artificial ceiling" on the value of Williams stock.[181] Buese admitted that she did not discuss this justification with any other director, vet it through advisors, or submit it for Board discussion.[182]

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[178] JX-126 at 1.

[179] JX-127 at 3–4.

[180] JX-69 at 48–49; Trial Tr. at 611:3–6 (Buese).

[181] Trial Tr. at 571:21–572:9 (Buese). Professor Subramanian made the same claim. *See* Subramanian Report ¶ 76 (stating that "pills have signaling effects, and eliminating a pill when there is no clear reason to do so could fuel speculation in the marketplace, thus creating unnecessary disruption to the company"). The plaintiffs' expert disputes this. *See* Mills Rebuttal Report ¶ 46. The Board never considered the issue, so the experts' dispute is irrelevant.

[182] Trial Tr. at 611:21–612:14 (Buese).

In fact, outside of the context of privileged discussions concerning this litigation,[183] the Board never considered redeeming the Plan.[184] In post-trial briefing, the defendants claimed that maintaining the Plan was a business judgment duly considered by the Board—they asserted that "the evidence shows that members of the Board, and on one occasion, the Board as a whole, have considered whether to redeem the Plan and decided that it was not in the Company's best interests to do so."[185] The defendants, however, asserted privilege over the "one occasion" when the "Board as a whole" supposedly considered whether to redeem the Plan. Consequently, there is no factual record to support the defendants' claim.[186]

Meanwhile, Williams stock price has substantially recovered. By June 8, 2020, Williams stock price had returned to $21.58; it closed at $21.68 on August 24, 2020.[187] Third-quarter financial results for 2020 noted the "stability and predictability of business,"

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[183] PTO ¶ 109, *see also* Trial Tr. at 120:22–121:15 (Cogut); *id.* at 355:21–356:9 (Smith); *id.* at 611:13–20 (Buese); Bergstrom Dep. Tr. at 84:7–85:18; Fuller Dep. Tr. 183:19–184:13, 202:16–203:17.

[184] PTO ¶ 109.

[185] Defs.' Opening Br. at 56.

[186] *Id.* Plaintiffs filed a motion *in limine* to preclude Defendants from relying on the Board communications over which Defendants asserted privilege. That motion is denied as unnecessary. Because Defendants blocked testimony as to this Board meeting at trial and in discovery, there is no factual record on which to base the finding they seek—that the Board considered whether to redeem the Plan and determined that not doing so was in the best interest of the Company.

[187] PTO ¶¶ 103–104.

and Armstrong touted the Company's strong performance "during a year marked by disruption and uncertainty."[188]

K. This Litigation

Plaintiff Steven Wolosky filed this litigation on August 27, 2020. Plaintiff City of St. Clair Shores Police and Fire Retirement System (with Wolosky, "Plaintiffs") filed a similar action on September 3, 2020. The court granted expedition on September 8 and consolidated the two actions on September 15.

The operative complaint asserts a direct claim for breach of fiduciary duty against the Director Defendants seeking declaratory and injunctive relief regarding the validity and enforceability of the Plan. The Complaint also names as defendants the Company and Computershare Trust solely in its capacity as the rights agent for the Plan (together with the Director Defendants, "Defendants").[189]

On November 11, 2020, over Defendants' objection, the court certified a class defined as: "all record and beneficial holders of company common stock who held stock as of March 20, 2020, and who continue to hold stock through and including the date on which the rights plan expires or is withdrawn, redeemed, exercised or otherwise

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[188] *Id.* ¶ 105.

[189] PTO ¶ 26.

eliminated," excluding Defendants.[190] A three-day trial was held from January 12 to 14, 2021. Post-trial briefing concluded on February 5, 2021.[191]

II. LEGAL ANALYSIS

Plaintiffs claim that the Director Defendants breached their fiduciary duties when adopting and maintaining the Plan. This decision agrees and issues a mandatory injunction requiring redemption.

A. Direct Versus Derivative

The parties dispute whether Plaintiffs' claim is derivative or direct. Plaintiffs argue that their claim is direct. Defendants argue that Plaintiffs' claim is derivative and thus subject to Court of Chancery Rule 23.1, which requires Plaintiffs to either make a pre-suit demand on the Board or to demonstrate that demand would have been futile. Plaintiffs did not make a pre-suit demand, and Defendants argue that Plaintiffs have failed to demonstrate demand futility, requiring judgment in Defendants' favor.

In 2004, the Delaware Supreme Court established a two-part test for determining whether claims are direct or derivative in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[192]

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[190] Dkt. 78, Tr. of 11.18.20 Oral Arg. and Rulings of the Ct. on Pls.' Mot. for Class Certification Held Via Zoom at 41.

[191] *See* Dkt. 106, The Williams Defs.' Opening Post-Trial Br. ("Defs.' Opening Br."); Dkt. 107, Pls.' Post-Trial Br. ("Pls.' Opening Br."); Dkt. 115, The Williams Defs.' Answering Post-Trial Br. ("Defs.' Answering Br."); Dkt. 117, Pls.' Post-Trial Answering Br. ("Pls.' Answering Br."). Computershare Trust filed memoranda with the court joining in the Williams Defendants' post-trial briefing. *See* Dkt. 108, Def. Computershare Trust Company, N.A.'s Post-Trial Mem. or, Alternatively, Joinder in The Williams' Defs.' Opening Post-Trial Opening Br.; Dkt. 118, Def. Computershare Trust Company, N.A.'s Joinder in The Williams Defs.' Answering Post-Trial Br.

[192] 845 A.2d 1031, 1033 (Del. 2004).

Tooley involved a third-party, two-step acquisition in which the target corporation consented to the acquirer postponing the closing of the first-step tender offer by twenty-two days.[193] Stockholder plaintiffs sued, claiming that the stockholders of the target corporation had a contractual right to have the offer close on time. The plaintiffs claimed that had the offer closed on time, the stockholders would have gotten their money faster. As damages, the plaintiffs sought the time value of money that they had lost from the delay.[194]

The Court of Chancery held that the claims were derivative and dismissed them under Rule 23.1.[195] In reaching this conclusion, the trial court relied on Delaware decisions employing the concept of "special injury" to determine when a plaintiff could sue directly.[196] Those decisions defined special injury as a wrong "separate and distinct from that suffered by other shareholders . . . or a wrong involving a contractual right of a shareholder."[197]

Applying the special-injury test, the trial court held that there was no meaningful distinction between the contract rights of the tendering and non-tendering stockholders, such that they all held parallel contract rights.[198] The decision then reasoned that

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[193] *Id.* at 1034.

[194] *Id.*

[195] *Id.* at 1033.

[196] *Id.* at 1035; *see Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1079 (Del. 1986).

[197] *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985) ("*Moran I*"), *aff'd*, 500 A.2d 1346 (Del. 1985) (internal citations omitted).

[198] *Tooley*, 845 A.2d at 1035.

"[b]ecause this delay affected all . . . shareholders equally, plaintiffs' injury was not a special injury, and this action is, thus, a derivative action at most."[199] In other words, the trial court accepted the argument that it was appropriate to treat a claim—there, a contractual claim—as derivative if all of the stockholders held the same right and all suffered the same injury to their parallel right.

The Delaware Supreme Court reversed. The high court recognized that the concept of special injury had become "amorphous and confusing"[200] and traced much of the uncertainty to *Bokat v. Getty Oil Co.*, where it held that "[w]hen an injury to corporate stock falls equally upon all stockholders, then an individual stockholder may not recover for the injury to his stock alone, but must seek recovery derivatively in [sic] behalf of the corporation."[201] The *Tooley* court described *Bokat* as "confusing and inaccurate" for the following reasons:

> It is confusing because it appears to have been intended to address the fact that an injury to the corporation tends to diminish each share of stock equally because corporate assets or their value are diminished. In that sense, the *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings. It does not arise out of any independent or direct harm to the stockholders, individually. *That concept is also inaccurate because a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim.*[202]

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[199] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 2003 WL 203060, at *4 (Del. Ch. Jan. 21, 2003).

[200] *Tooley*, 845 A.2d at 1035.

[201] 262 A.2d 246, 249 (Del. 1970), *abrogated by Tooley*, 845 A.2d at 1038–39.

[202] *Tooley*, 845 A.2d at 1037 (emphasis added).

In this passage, *Tooley* reframed the analysis in a way intended to remedy the confusion caused by *Bokat* by distinguishing between (i) an injury that fell *indirectly* on all stockholders equally, which supported a derivative claim, and (ii) an injury that affected stockholders *directly*, even if all stockholders suffered the same injury, which gave rise to a direct claim.[203] *Tooley* then expressly rejected the special-injury test in favor of a new, two-part standard, asking: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[204]

No decision since *Tooley* has addressed whether a claim seeking to enjoin a stockholder rights plan is derivative. In one decision, this court dismissed under Rule 23.1 a claim for damages challenging a defensive action, but the defensive action did not involve a rights plan and the plaintiff did not dispute that the claim was derivative.[205] In another decision considering a challenge to a series of anti-takeover measures, the court deemed the direct-derivative distinction immaterial to the outcome and thus declined to determine whether the claims were solely derivative.[206]

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[203] *See generally In re El Paso Pipeline P'rs, L.P. Derivative Litig.*, 132 A.3d 67, 97–99 (Del. Ch. 2015) (describing *Tooley*'s treatment of the analysis in *Bokat*), *rev'd on other grounds sub nom, El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016).

[204] *Tooley*, 845 A.2d at 1033.

[205] *Ryan v. Armstrong*, 2017 WL 2062902, at *10, *18 (Del. Ch. May 15, 2017) (dismissing a concededly derivative stockholder challenge to a defensive measure where the plaintiff failed to plead that a majority of the board was interested in the transaction and instead relied on "*Unocal* to get around the demand requirement").

[206] *In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, at *14–16 (Del. Ch. July 24, 2014) (denying motion to dismiss claims challenging, in part, a golden parachute award as an

Tooley, however, did not expressly overrule the cases applying the special-injury test, and the decision suggested that some of those cases might have reached the right outcome, thus opening the door for litigants to rely on decisions predating *Tooley*.[207] In briefing, Defendants rely on this court's pre-*Tooley* decision in *Moran* ("*Moran I*") for the proposition that poison pill challenges must be brought derivatively.

In *Moran I*, the board of Household International, Inc. ("Household") adopted a rights plan with 20% and 30% triggers as a preventive measure to fend off a potential takeover by an entity affiliated with one of Household's own directors.[208] Applying the special-injury test, the trial court concluded that the stockholder plaintiff's challenge was derivative:

> [W]here, as here, no shareholder is presently engaged in a proxy battle, and the alleged manipulation of corporate machinery does not directly prohibit proxy contests, such an action must be brought derivatively on behalf of the corporation."[209]

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unreasonable anti-takeover device, concluding that "whether this claim is direct or derivative is immaterial" to the outcome on a motion to dismiss); *see also In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999) (finding under the pre-*Tooley* special-injury test that a claim challenging a rights plan was direct in nature, but observing that claims "implicating the heightened scrutiny required by *Unocal*" will pass the demand futility test under *Aronson*); *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024, at *4 (Del. Ch. July 27, 1992) (concluding under the pre-*Tooley* special-injury test that the court "need not (and therefore does not) decide whether the plaintiffs' recission claims [challenging a rights plan] are solely derivative" because they satisfied the *Aronson* test).

[207] *See Tooley* 845 A.2d at 1039.

[208] *Moran I*, 490 A.2d at 1066.

[209] *Id.* at 1070.

Defendants interpret the above-quoted language as creating a rule that all poison pill challenges are derivative subject to a narrow exception that applies during an active proxy contest.[210] For simplicity, this decision refers to this characterization of *Moran I* as the "derivative presumption." Based on this presumption, Defendants argue that because Plaintiffs are not engaged in a proxy contest, they cannot pursue their claims directly.

As with any pre-*Tooley* holding, a court must determine whether the ruling resulted from the now-defunct special-injury test.[211] The derivative presumption of *Moran I* suffers from this flaw, as language found just two sentences after the above-quoted language reveals: "*Because the plaintiffs are not engaged in a proxy battle, they suffer no injury distinct from that suffered by other shareholders* as a result of this alleged restraint on the ability to gain control of Household through a proxy contest."[212] The emphasized language reflects that the *Moran I* court viewed the exception—a stockholder's active pursuit of a proxy battle—as a "separate and distinct" feature giving rise to a special injury. Absent that special injury, the *Moran I* court saw the pill as affecting the rights of all stockholders to the same degree. The derivative presumption of *Moran I* thus appears to be a direct application of the special-injury test, and this aspect of *Moran I* was thus impliedly abrogated by *Tooley*.

Even before *Tooley*, the derivative presumption of *Moran I* drew criticism. Just a few months after the Delaware Supreme Court issued *Moran II*, which affirmed *Moran I*

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[210] Defs.' Opening Br. at 22.

[211] *See Tooley*, 845 A.2d at 1039.

[212] *Moran I*, 490 A.2d at 1070 (emphasis added).

without addressing the derivative question, a federal court rejected a pleading-stage argument that a claim challenging a poison pill adopted by the board of Crown Zellerbach Corporation was derivative in nature.[213]

In 1994, the American Law Institute's *Principles of Corporate Governance* highlighted the issue, commenting that "[c]ases have divided as to whether the issuance of a 'poison pill' security can be challenged by a direct action on the grounds that it chills voting rights or restricts the alienability of the shareholder's stock."[214] Foreshadowing the law's development in *Tooley*, the passage criticized *Moran I* because its "focus on the similarly of treatment misses the central point that fundamental shareholder rights (e.g., voting and alienability) can be infringed by a variety of board actions that treat existing shareholders alike."[215]

In 1999, this court in *Gaylord* criticized the derivative presumption in *Moran I*.[216] There, management owned a majority of the company's Class B, super-voting stock, which gave management control of the company.[217] A Chapter 11 restructuring required that the company reclassify its Class B stock and issue additional equity, which would reduce management's voting power from 74% to 20%.[218] Planning ahead, the management-

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[213] *See Duman v. Crown Zellerbach Corp.*, 107 F.R.D. 761, 764–65 (E.D. Ill. 1985).

[214] 2 *Principles of Corporate Governance: Analysis and Recommendations* § 7.01 n.3, at 29 (Am. L. Inst. 1994).

[215] *See id.*

[216] *See Gaylord*, 747 A.2d at 76–79.

[217] *Id.* at 72–73.

[218] *Id.* at 73.

dominated board developed a strategy to maintain their control. First, the board adopted a poison pill with a 15% trigger that made it economically impractical for anyone to accumulate a meaningful block without the board's approval. Second, management exercised its power at both the board and stockholder levels to adopt a series of defensive charter and bylaw amendments before their voting control expired.[219] The stockholders challenged the defensive measures and the claims survived a motion to dismiss.[220]

On a motion for class certification, then-Vice Chancellor Strine was required to determine whether the complaint pled derivative or direct claims.[221] He criticized the reasoning of the rule of *Moran I* on multiple grounds, centering on *Moran I*'s failure to acknowledge who suffered the harm.[222] He pointedly asked "why a board's action to interpose itself between stockholders who are ordinarily free to sell their shares, and purchasers who are ordinarily free to buy those shares—if improper—works an injury *on the corporation as an entity*."[223] By contrast, he thought it was "obvious" that the plan infringed on stockholders' fundamental rights to sell and vote.[224] In the end, the Vice Chancellor followed the derivative presumption of *Moran I* but observed that the ruling

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[219] *Id.*

[220] Then-Vice Chancellor Balick denied the motion, concluding that *Unocal* applied without analyzing whether the plaintiff's claims were direct or derivative in nature, reasoning that invocation of *Unocal* sufficed to defeat a motion to dismiss. *In re Gaylord Container Corp. S'holders Litig.*, 1996 WL 752356, at *2 (Del. Ch. Dec. 19, 1996).

[221] *See Gaylord*, 747 A.2d at 74–75.

[222] *See id.* at 76–79.

[223] *Id.* at 78 (emphasis added).

[224] *Id*.

was immaterial on the facts of the case.[225] The Vice Chancellor explained that if the plaintiff stated a claim implicating *Unocal*, then the practical effect was "automatic demand excusal" under *Aronson*.[226]

Tooley addressed the faulty logic of *Moran I*'s derivative presumption. It is now possible to embrace the reasoning of *Gaylord* and acknowledge that poison pills, if improper, work an injury on stockholders directly by interfering with at least two fundamental stockholder rights.

"Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue."[227] From these fundamental rights flow

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[225] *Id.* at 82–83; *see Moran I*, 490 A.2d at 1069–71.

[226] *Gaylord*, 747 A.2d at 83; *id.* at 81 (observing that "[s]o long as the plaintiff states a claim implicating the heightened scrutiny required by *Unocal*, demand has been excused under" *Aronson*). At the time, that statement accurately described of Delaware law. The *Aronson* test announced in 1984 used "the standard of review for the challenged decision as a proxy for whether directors face a substantial likelihood of liability sufficient to render demand futile." *United Food and Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162, at *15 (Del. Ch. Oct. 26, 2020). For many years following *Aronson*, application of enhanced scrutiny or entire fairness had the collateral effect of satisfying the pleading-stage demand futility analysis. *Id.* at *9–11. Delaware law subsequently evolved to imbue the derivative-direct distinction with greater practical import. As Vice Chancellor Laster explained in his recent *Zuckerberg* decision, the standard of review no longer serves as a proxy for determining whether demand will be futile, and the hair-splitting direct-derivative distinction now has greater significance in the current jurisprudential landscape of Delaware law. *Id.* at *15–16; *see also Armstrong*, 2017 WL 2062902, at *13 (rejecting a *per se* rule that a well-pled *Unocal* claim is sufficient to survive a Rule 23.1 demand futility analysis).

[227] *Strougo v. Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015); *see also EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012); *Unitrin*, 651 A.2d at 1379 (affirming stockholders' fundamental right to vote).

subsidiary rights, including the right to communicate with other stockholders,[228] nominate directors,[229] and communicate with (and even oppose) management and the Board.[230] As this court has observed, "[o]ne of the basic rights of a stockholder is to be able to communicate with his fellow stockholders on matters germane to such stock, and, if necessary, to organize other stockholders for corporate action."[231]

All rights plans interfere to a some degree with the right to sell and the right to vote, but *Moran* held that the level of interference is nominal in the traditional anti-takeover pill that has both a relatively high trigger and an exception for soliciting revocable proxies. A traditional pill did not attempt to restrict stockholder communications. As discussed below, the Plan goes beyond a traditional pill by combining a parsimonious trigger of 5% with the AIC Provision and a limited passive ownership exception. Through this combination of provisions, the Plan limits the act of communicating itself, whether with other stockholders or management. It also restricts the stockholder's ability to nominate directors. It thus infringes on the stockholders' ability to communicate freely in connection with the stockholder franchise, much of which occurs outside the context of proxy contests.[232] This articulation of the harm flows to stockholders and not the Company.[233] In this way,

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[228] *B.F. Goodrich Co. v. Nw. Indus., Inc.*, 1969 WL 2932, at *2 (Del. Ch. Mar. 26, 1969).

[229] *Harrah's Ent., Inc. v. JCC Hldg. Co.*, 802 A.2d 294, 310–11 (Del. Ch. 2002).

[230] *Abajian v. Kennedy*, 1992 WL 8794, at *6 (Del. Ch. Jan. 17, 1992).

[231] *B.F. Goodrich,* 1969 WL 2932, at *2.

[232] Trial Tr. 189:13–190:14 (Mills).

[233] Defendants argue that Plaintiffs cannot show injury because Wolosky testified that he does not intend on running a proxy contest, replacing any director, acquiring more than 5% of Williams stock, engaging in a takeover transaction, or engaging with other stockholders,

enjoining the Plan is a remedy that affects stockholders alone and not the Company. Thus, Plaintiffs' claim is direct under *Tooley*.[234]

B. The Standard of Review

The parties also dispute the applicable standard of review. Plaintiffs contend that *Unocal* governs the court's analysis. Defendants argue that the more deferential business judgment standard applies.

Since the Delaware Supreme Court's decision in *Moran*, this court "and the Supreme Court have used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed."[235]

Defendants nevertheless argue that the Board's adoption and maintenance of the Plan should be subject to business judgment review. Defendants say that the sole

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and he is not aware of any Williams stockholders who have refrained from taking this action because of the Rights Plan. *See* Defs.' Opening Br. at 21–22. They portray Wolosky's harm as entirely speculative. But it is not incumbent on a class representative to prove a negative. Given the Plan's features, the absence of stockholder activism could be a consequence of the Plan. And the fact that the Plan is alleged to have impeded the stockholder franchise suffices to render Plaintiffs' claims direct.

[234] At trial, Wolosky testified that the Plan impairs the value of the Company as a whole by stifling value-enhancing activities. Trial Tr. at 28:21–23 (Wolosky). Defendants seize on this testimony to argue that any damages would flow to the Company as a whole and not its stockholders directly. *See* Defs.' Opening Br. at 20 (quoting Trial Tr. at 28:11–23 (Wolosky)). Defendants' argument might have merit if Plaintiffs were pursuing a claim for damages, but Plaintiffs seek only injunctive relief. *See* Wolosky Compl., Prayer for Relief at 20–21. Because Plaintiffs are not seeking damages, this court need not resolve whether such a claim would be derivative in nature.

[235] *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *15 (Del. Ch. May 2, 2014); *see also eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 28 (Del. Ch. 2010) ("Enhanced scrutiny has been applied universally when stockholders challenge a board's use of a rights plan as a defensive device.").

justification for *Unocal's* enhanced standard is "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[236] Defendants argue that this specter is not present where a poison pill is designed to address stockholder activism as opposed to hostile takeover attempts.

There are many possible responses to Defendants' attempt to parse finely the concept of entrenchment, but it suffices for present purposes to say that Defendants' contention runs contrary to the Delaware Supreme Court's decision in *Selectica II*.[237] There, the poison pill was adopted for the purpose of preserving NOL assets and not warding off hostile takeover attempts.[238] The court held that the *Unocal* standard nevertheless applied because all poisons pills, "by . . . nature," have a potentially entrenching "effect."[239] It is therefore settled law that the Board's compliance with their

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[236] Defs.' Opening Br. at 27 (quoting *Unocal*, 493 A.2d at 954 (Del. 1985)); *see also Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 474 (Del. Ch. 2000) (observing the "omnipresent specter" implicated "[w]hen a board adopts measures designed to deter or defend against an acquisition offer and thereby also against the possibility that the board and management will lose their positions after the acquisition").

[237] 5 A.3d 586.

[238] *Selectica II*, 5 A.3d at 599.

[239] *Id.* ("Any NOL poison pill's principal intent . . . is to prevent the inadvertent forfeiture of potentially valuable assets, not to protect against hostile takeover attempts. Even so, any Shareholder Rights Plan, by its nature, operates as an antitakeover device. Consequently, notwithstanding its primary purpose, a NOL poison pill must also be analyzed under *Unocal* because of its *effect* and its direct implications for hostile takeovers." (emphasis added)); *see also Third Point*, 2014 WL 1922029, at *15 & n.10 (applying *Unocal* to an anti-activist poison pill, observing that Delaware courts have "used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed" and that "[t]his includes cases in which a rights plan has been used outside of the hostile takeover context"); *Air Prods. and Chems. v. Airgas, Inc.*, 16 A.3d 48, 94 (Del. Ch. 2011) (observing that "[t]he *Unocal* standard of enhanced judicial scrutiny—not the business judgment rule—is the standard of review that applies to a board's defensive

fiduciary duties in adopting and then failing to redeem the Plan must be assessed under *Unocal*.[240]

C. The *Unocal* Analysis

Having addressed the two threshold issues, this decision now turns to the merits of the enhanced scrutiny analysis. *Unocal* calls for a two-part inquiry. "The first part of *Unocal* review requires a board to show that it had reasonable grounds for concluding that a threat to the corporate enterprise existed."[241] Framed more broadly, directors must demonstrate that they acted in good faith to achieve a "legitimate corporate objective."[242]

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actions taken in response to a hostile takeover," and that "[t]his is how Delaware has always interpreted the *Unocal* standard"); *eBay*, 16 A.3d at 28 (observing that "[e]nhanced scrutiny has been applied universally when stockholders challenge a board's use of a rights plan as a defensive device"); *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 330–36 (Del. Ch. 2010) (applying *Unocal* to an anti-activist poison pill).

[240] Defendants attempt to meet *Selectica* with an overly narrow concept of entrenchment. "Entrench" means to fortify a position—to make change difficult or unlikely. *See, e.g., Entrench*, Merriam Webster, https://www.merriam-webster.com/dictionary/entrench (defining "entrench' as "to place within or surround with a trench especially for defense," "to place (oneself) in a strong defensive position," and "to establish solidly"); *Entrench*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/entrench (defining "entrench" as "to firmly establish something . . . so that it cannot be changed"); *Entrench*, Lexico, https://www.lexico.com/en/definition/entrench (defining "entrench" as to "[e]stablish (a person or their authority) in a position of great strength or security," noting that the word originates from "the sense 'place within a trench'"). As discussed below, the Board in this case acted with the purpose of insulating the Board and management from stockholder influence during a time of uncertainty. This conduct thus seems to fit the definition of entrenchment.

[241] *Selectica II*, 5 A.3d at 599.

[242] *See Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 807–810 (Del. Ch. 2007) (cautioning against placing "too much emphasis on the word 'threat'" when conducting a *Unocal* review); *id.* (stating that "[t]he core of *Unocal*'s utility really rests in the burden it asserts on directors to: (1) identify the proper corporate objectives served by their actions; and (2) justify their actions as reasonable in relationship to those objectives").

To satisfy the first part of *Unocal*, Defendants must demonstrate that the Board conducted a "good faith and reasonable investigation."[243] The reasonableness of the investigation is "materially enhanced"[244] where the corporate decision is approved by a board comprising a majority of outside, nonemployee directors "coupled with a showing of reliance on advice by legal and financial advisors."[245]

To meet their burden under the first part of *Unocal*, however, Defendants must do more than show good faith and reasonable investigation. "[T]he first part of *Unocal* review requires more than that; it requires the board to show that its good faith and reasonable investigation *ultimately gave the board 'grounds for concluding that a threat to the corporate enterprise existed*.'"[246] In other words, after conducting a reasonable investigation and acting in good faith, the board must show that it sought to serve a legitimate corporate objective by responding to a legitimate threat. If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat warranted a response, will not be enough to save the board.

The second part of *Unocal* requires a board to show that the defensive measures were "reasonable in relation to the threat posed."[247] This element of the *Unocal* test

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[243] *Unocal*, 493 A.2d at 955.

[244] *Id.*

[245] *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *12 (Del. Ch. Feb. 26, 2010) ("*Selectica I*").

[246] *Air Prods.*, 16 A.3d at 104 (quoting *Selectica II*, 5 A.3d at 599) (emphasis added).

[247] 493 A.2d at 949. By adopting the nomenclature of *Unocal*, this court does not place "too much emphasis on the word 'threat.'" *Mercier*, 929 A.2d at 807.

recognizes that a board's powers to act "are not absolute" and that a board "does not have unbridled discretion to defeat any perceived threat by any Draconian means available."[248] When applying the reasonableness standard, the court does not substitute its judgment for that of the board. The court instead determines whether the measure falls within "the range of reasonableness."[249]

When conducting the proportionality analysis, the court also examines the relationship between the defensive action that the directors took and the problem they sought to address.[250] The court thus examines "the reasonableness of the end that the directors chose to pursue, the path that they took to get there, and the fit between the means and the end."[251] It is the specific nature of the threat that "sets the parameters for the range

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[248] 493 A.2d at 949.

[249] *Unitrin*, 651 A.2d at 1387–88 (quoting *Paramount*, 637 A.2d at 45–46).

[250] *See Mercier*, 929 A.2d at 808.

[251] *See Obeid v. Hogan*, 2016 WL 3356851, at *13 (Del. Ch. June 10, 2016) (providing overview of enhanced scrutiny); *Mercier,* 929 A.2d at 810–811 (explaining that when directors take action that affects stockholder voting, enhanced scrutiny requires that the defendant fiduciaries bear the burden of proving (i) that "their motivations were proper and not selfish," (ii) that they "did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way," and (iii) that the directors' actions "were reasonable in relation to their legitimate objective"); *id.* at 811 ("If for some reason, the fit between means and ends is not reasonable, the directors would also come up short."); *see also In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch.2010) (explaining that when applying enhanced scrutiny, "the court seeks to assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and to thereby smoke out mere pretextual justifications for improperly motivated decisions"); *id. at 599–600* ("[T]he reasonableness standard requires the court to consider for itself whether the board is truly well motivated (i.e., is it acting for the proper ends?) before ultimately determining whether its means were themselves a reasonable way of advancing those ends."); *cf. Yucaipa*, 1 A.3d at 337 ("*Unitrin* left room

of permissible defensive tactics" and a "reasonableness analysis requires an evaluation of the importance of the corporate objective threatened; alternative methods for protecting that objective; impacts of the defensive action and other relevant factors."[252]

1. The Director Defendants' Reasons for Acting

The Director Defendants' actual and articulated reason for taking action figures prominently in the *Unocal* analysis. In the traditional language of *Unocal*, the directors must have identified and responded to a legitimate corporate threat. They cannot justify their conduct based on threats that they never identified or beliefs they did not hold.[253] Before turning to the question of whether the threat is legitimate, the court must determine why the Director Defendants acted. This decision therefore starts by making factual findings concerning the threat or corporate objective to which the Board was responding when adopting the Plan.

a. The Actual Threats That the Board Identified

It is often difficult to distill a unified purpose behind a decision made by a group of people; often, members of the group have different reasons for supporting a decision. It is particularly difficult to discern such a purpose in the context of litigation, where there is

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for a determination that a non-preclusive, non-coercive defensive measure was nonetheless unreasonable in light of the threat faced by the corporation.").

[252] *Selectica I*, 2010 WL 703062, at *19 (internal quotation marks omitted) (first quoting *Unitrin*, 651 A.2d at 1384, and then quoting *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989)) (internal quotation marks omitted).

[253] *See, e.g.*, *Chesapeake Corp. v. Shore*, 771 A.2d 293, 332 (Del. Ch. 2000) (finding that board did not identify and consider a threat it later relied on at trial).

always the risk that fact witnesses will recall events that occurred prior to litigation through the lens of newly crafted litigation positions.

This challenging task is further complicated here because the lawyer-drafted documents to which one would typically look for a statement of a board's purpose—e.g., board resolutions, board minutes, company disclosures—do not reflect the Board's actual intent. The materials from the March 19 Board meeting, including the resolution, the March 20 Press Release, and the March 30 Proxy Supplement, all state that the Plan was intended in part to serve as a takeover deterrent.[254] But the Plan was not designed for that

[254] JX-67 at 2 (March 19 Board meeting minutes) ("The Board deems it desirable and in the best interests of the Company and its stockholders that *steps be taken to preserve for the Company's stockholders the long-term value of the Company* in the case of *a coercive or inadequate takeover* or *rapid accumulations of large positions by persons not having a passive intent*." (emphasis added)); JX-69 at 2 (March 20 Williams press release) ("The Board . . . has adopted the [Plan] to reduce the likelihood that a *potential acquirer would gain (or seek to influence or change) control of the Company by open market accumulation or other tactics without paying an appropriate premium for the Company's shares*. (emphasis added)); JX-82 at 3 (March 30 Proxy Supplement) ("The Board determined that the adoption of the [Plan] is appropriate in light of the extreme market dislocation that has resulted in the company's stock being fundamentally undervalued. The conditions stemming from the impact of COVID-19 on the economy and the volatility of the oil market have resulted in significant decline in the company's stock price. *The [Plan] is intended* to enable all Williams stockholders to realize the full value of their equity investment and *to reduce the likelihood* of those seeking short-term gains taking advantage of current market conditions at the expense of the long-term interests of stockholders or *of any person or group gaining control of Williams through open market accumulation or other tactics* (especially in volatile markets) without paying an appropriate control premium." (emphasis added)); *id.* ("The company has, as of the date of this supplement, reached out to all of our major stockholders regarding our rights plan. Most of the stockholders we have engaged with to date have informed us that they understand the need for the adoption of our [Plan] in the context of the highly unusual and extreme circumstances that led to the current severe market conditions and the need to protect the interests of the company and its long-term stockholders." (emphasis added)).

purpose, and some of the directors did not have that in mind when adopting the Plan.[255] The Plan was not adopted with the objective of deterring takeover attempts.

In fact, the Plan was not adopted to protect against any *specific* threat at all.[256] The

[255] *See* Trial Tr. at 93:16–19 (Cogut) (confirming that "the pill wasn't intended or designed to deal with the risk of a takeover at all"); *id.* at 515:1–7 (Subramanian) (opining that "this rights plan was not meant to be a hostile takeover deterrent" and that "the pill would have been virtually irrelevant for that kind of hostile bid" because the company was vulnerable to takeover activity for other reasons). Other witnesses were more qualified in their statements, testifying that the Plan was not intended to deal with a *specific* takeover threat. *See, e.g.*, *id.* at 599:7–10 (Buese) (confirming that "the pill was not adopted in response to any person or group attempting to take control of the company"); Bergstrom Dep. Tr. at 179:23–180:16 (testifying that he was "not aware of any specific takeover threat at the time"). *But see* Fuller Dep. Tr. at 56:8–20 (testifying that "we were doing something to protect the long-term shareholders and prevent someone coming in and, you know, sort of acquiring stock at very low levels and possibly . . . *forcing a sale of the company* below its long-term value" (emphasis added)).

[256] PTO ¶ 82; Trial Tr. at 544:8–15 (Buese) (testifying that "there was no actual threat"); Bergstrom Dep. Tr. at 181:13–19 (testifying that "we were not aware of any specific threat, as I earlier testified"); Fuller Dep. Tr. at 234:22–235:5 (testifying that she perceived no "current threat" to Williams when the Plan was adopted); *see also* JX-78 at 11 (Chandler telling investors during a Mar. 25, 2020 business update call: "we did not adopt that [rights] plan . . . in response to any specific threat"); JX-187 at 12 (Krieg emailing Wilson and Chandler on Apr. 13, 2020, with points for Apr. 15, 2020 investor relationship call, stating that the "[p]lan was not adopted in response to any known / specific threat"); JX-62 at 1 (Chandler writing in a Mar. 19, 2020 email: "I do think it is important to leave the reader with the belief this [adoption of the Plan] is not being done because of some ominous business results that will be coming out . . . . But purely because we don't think the market price is reflective of our value." (ellipses in original)); *id.* at 2 (Chandler writing in a Mar. 18, 2020 email: "We will want to alleviate fears that we are doing this because something ominous is coming."); *id.* (Krieg writing in a Mar. 18, 2020 email that "the strong position of our business is not being recognized by the market; we don't want opportunist [sic] to swoop in and claim the true value of the business at an artificially low value"); Trial Tr. at 92:5–10 (Cogut) ("I think it's an open question as to whether or not there needed to be a threat for us to have taken this action."); *id.* at 353:6–354:2 (Smith) (testifying that he was not aware of any activists, or persons generally, seeking to take advantage of Williams stock price at the time the Plan was adopted).

Board was not concerned about any specific activist threat.[257] Nor was the Board acting to preserve any specific asset like an NOL.[258] Instead, the Board was acting pre-emptively to interdict hypothetical future threats.[259]

The Plan was also not adopted in light of the Company's prior experience with activism, although Defendants took that position throughout this litigation.[260] It is true that

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[257] *See* Trial Tr. at 321:8–10 (Smith) (testifying that he was not aware of "any particular risks with respect to shareholder activism"); *id.* at 93:20–94:7 (Cogut) ("There was, to the best of our knowledge at that point, very little activist involvement, but there was . . . a market opportunity for people who might want to come in and exercise influence and control over the company. . . ."); *id.* at 599:11–14 (Buese) (confirming that the Plan "was not adopted in response to any person or group attempting to exercise influence over the company"); Bergstrom Dep. Tr. at 182:5–9 (testifying that "[t]here was not any specific activist investor threat"); Fuller Dep. Tr. at 196:3–13 (testifying that the "danger" was that "someone could amass a fair amount of stock and put itself in a position of forcing the board to take action that was not in the best interest of the long-term shareholders").

[258] Trial Tr. at 598:23–599:2 (Buese); *id.* at 346:19–22 (Smith); Chandler Dep. Tr. at 195:17–21.

[259] *See* JX-73 at 1 (Wilson emailing management on Mar. 20, 2020: "I think I can help convince [Blackrock] that this was *solely a proactive effort, that we monitor our positions frequently and that we have no indication of anyone being in our stock.* We can also be very definitive that we have not received an offer. I also think its fair game to point out that the company has been through this once before recently and saw how an *activist can destroy long term value* – again purely proactive." (emphasis added)); *id.* at 2 (Wilson emailing management on Mar. 20, 2020: "I think we can craft a very good argument that this should be viewed by our long term investors as good governance. . . . Activists always push the needle in the wrong direction on those issues, so we are being ***proactive to prevent an activist*** from making a lot of short term money at the cost of the very things Blackrock views as most important." (emphasis added)).

[260] JX-144 at Response to Interrogatory No. 1 ("The Board's views and conclusions were also reinforced by Williams' experience during the 2013 to 2016 time period with two shareholder activists, each of whom held less than 5% of Williams stock but who acted together in a coordinated attempt to exert substantial influence over Williams."); Subramanian Report ¶ 16 ("I understand from my review of deposition testimony taken in this action that one of the factors that motivated the Board's adoption of a poison pill in

Williams management cited prior activism as a justification for the Plan when communicating with stockholders in advance of the annual meeting.[261] It is also true that Smith's prior experience appears to have contributed to his support of the Plan.[262] But there is no evidence that it was a motivating factor of the Board as a whole. The Board simply did not discuss the Company's prior experience with activism during the March 18 or March 19 meetings.[263] This justification appears to have emerged at the Board level after the Plan had been adopted.[264] Indeed, Cogut testified that "the fact that the company

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March 2020 was Williams' past experience with shareholder activists several years earlier.").

[261] *See, e.g.,* JX-117 at 7 (communicating to stockholders that "Company experience in recent past reinforced Board's view that 5% is the right threshold in this environment"); JX-70 at 1 (strategizing a response to Blackrock's concerns, Wilson noting that "it's fair game to point out that the company has been through this once before recently and saw how an activist can destroy long term value"); JX-187 at 3 (noting, in a document containing talking points for conversations with investors, that Company representatives should discuss: "Company recent past experiences with activism – Corvex and Sorobon [sic] owned, either as beneficial owners or as economic interest owners, 9.96% of the Company's outstanding shares. Neither owned more than 5%.").

[262] *See* JX-46 (Smith emailing Wilson on the evening of March 17 that he was "[v]ery happy about the upcoming discussion on a shareholders rights plan especially after recounting to [Cogut] what we went thru [sic] in 2015/16"); *see also* Trial Tr. at 322:9–323:12 (Smith) (testifying that his email referred to the activism Williams had previously faced, but that he had not discussed that experience "at this particular time"); *id.* at 351:23–352:24 (Smith).

[263] Trial Tr. at 334:1–10 (Smith); *id.* at 548:23–549:3 (Buese); *id.* at 143:21–144:4 (Cogut).

[264] For example, Cogut's first mention of the prior activism appears in an April 9, 2020 email exchange with Wilson where Wilson suggested adding to the "talking points" to be discussed with stockholders that "Corvex and Sorobon [sic] owned, either as beneficial owners or as economic interest owners, 9.96% of our outstanding shares. We'll have that in the talking points or facts. It goes to the very reason we did 5%." JX-104. *But see* Trial Tr. at 169:5–12 (Cogut) (testifying that the 5% trigger "was there for a number of reasons, but not because the Corvex and other guys had 9.6"). And testimony by the Director Defendants unequivocally confirms that the subject was never discussed by the Board in

had to deal with activists before was not a motivating force"[265] and that he "would have had the same idea whether or not the company had ever had activist experience."[266]

The record is clear that the Company's declining stock price was the initial catalyst for the Board's decision. Testimony and contemporaneous emails align on this fact.[267] The context and timing of the Plan's adoption further corroborates it, as the Board called an "urgent" meeting as its stock price continued to decline in the wake of the market disruption caused by COVID-19 and the oil pricing war.[268]

When asked during trial and at their respective depositions about the reasons for adopting the Plan, Cogut, Smith, Buese, Bergstrom, and Fuller testified generally that the

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connection with its pill deliberations. *Id.* at 143:21–144:4 (Cogut); *id.* at 334:1–19; 352:15–353:5 (Smith); *id.* at 548:23–549:15, 577:23–579:11 (Buese).

[265] Trial Tr. at 143:21–24 (Cogut).

[266] *Id.* at 144:2–4 (Cogut).

[267] *See* JX-50; JX-62; JX-171; Trial Tr. at 320:1–24 (Smith); *id.* at 551:7–10, 554:18–555:3 (Buese); Bergstrom Dep. Tr. at 182:5–14; *see also* Trial Tr. at 147:20–148:5 (Cogut) ("And, obviously, other than being concerned that there would be market dislocation because of COVID, you know, I had no expectation that, you know, over the course of the next two to three weeks that the stock would fall the way it did.").

[268] *See* JX-45 at 1 (proposing "an urgent special telephonic board meeting to discuss the possibility of a shareholder rights plan"); PTO ¶ 83 ("The conditions that caused the significant decline in Williams stock price stemmed from the impact of COVID-19 on the economy and the volatility of the oil market relating to the pricing war . . . ."); PTO Ex. A (noting Williams' declining stock price during March 2020). In briefing, Plaintiffs made much of the fact that Cogut testified that he "wasn't really concerned that the [stock] price was low," *see* Pls.' Opening Br. at 20, but Cogut made this statement almost immediately after affirming his concern that "the stock price would create a certain amount of opportunism and availability" for activism to emerge. Trial Tr. at 143:9–20 (Cogut). Cogut's testimony, therefore, does not undermine the weight of evidence reflecting that the market-wide dislocation was the impetus behind the Plan.

intent of the Plan was to deter stockholder activism, although they all added their own gloss when articulating this purpose.

Cogut's testimony was the most unadorned and refreshingly candid. He testified that he proposed the Plan to insulate the Board and management from all forms of stockholder activism during the uncertainty of the pandemic. In Cogut's words:

- The Rights Plan was a "novel concept" that used "the technology of shareholder rights plans to ***provide insulation [for] management during the uncertainty created by the pandemic***."[269]

- The Plan's objective was agnostic regarding different kinds of activism. When asked whether Cogut was "drawing distinctions between different kinds of activism" the Plan was trying to halt, he responded: "***Any activism that would influence control over the company*** at an aggregate level above 5 percent, yeah."[270]

- The Plan's value was its ability "to prevent against an activist buying a toehold of 5 percent or more or acting in concert with other activists ***so that our management could be freed up . . . to run a company during COVID***."[271]

- The Plan's power was immense: "[T]he shareholder rights plan is the ***nuclear weapon of corporate governance***," and "nuclear weapons are deterrents" that would force activists to deal with the Board instead of talking to each other.[272]

- The Plan's objective was to impose a "***one-year moratorium***" on activism.[273]

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[269] Trial Tr. at 69:8–11 (Cogut) (emphasis added); *see also id.* 69:22–70:1 (Cogut) (confirming his view that the purpose of the pill was to "protect against activists during COVID"); JX-41 (Cogut writing in a March 17, 2020 email that "[t]he goal is to prevent a raider from taking advantage of the current situation").

[270] Trial Tr. at 70:20–71:5 (Cogut) (emphasis added).

[271] *Id.* at 114:24–125:13 (Cogut) (emphasis added).

[272] *Id.* at 114:10–20 (Cogut) (emphasis added).

[273] *Id.* at 118:11–18 (Cogut) (emphasis added).

Smith similarly testified that he hoped to protect the company from outside pressures to allow the Board and management to "get our job done."[274] Smith expressed a desire to protect long-term interests. Smith also expressed a desire to force stockholders seeking to accumulate stock in excess of 5% to negotiate with the Board. In Smith's words:

- He described the rights plan as "one more arrow in the quiver" to "***protect the company from more outside pressures*** so we can get our job done."[275]
- His concern was: "[H]ow do we ***protect our long-term shareholders***? And how do we protect this company?"[276]
- He was not focused on "any particular risks with respect to shareholder activism," but he instead sought to "creat[e] a pathway that would allow us to move forward."[277]
- He viewed the Plan as a form of buffer—"***guardrails along the track*** so that we could have a map to be able to rationally deal with any type of event that might occur under a shareholder rights plan."[278]

Buese too was concerned about stockholder activism, but she focused more specifically on "short-term-oriented investors."[279] She also expressed concerns about the "rapid accumulation by shareholders."[280] In Buese's words:

- "[I]n the energy space, and the MLP sector in particular, ***there were a number of well-known short-termist parties*** and hedge funds who were

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[274] *Id.* at 320:19–20 (Smith).

[275] *Id.* at 320:15–321:5 (Smith) (emphasis added).

[276] *Id.* at 320:21–24 (Smith) (emphasis added).

[277] *Id.* at 321:8–10 (Smith); *see also* JX-46 (Smith writing in a March 17, 2020 email that he was "[v]ery happy about the upcoming discussion on a shareholders rights plan especially after recounting to [Cogut] what we went thru [sic] in 2015/16").

[278] Trial Tr. at 354:19–23 (Smith) (emphasis added).

[279] *Id.* at 539:22 (Buese).

[280] *Id.* at 601:16–17 (Buese).

known to work together in certain circumstances and had done so in the past."[281]

- The volatility in Williams stock price "was creating a lot of uncertainty and ***risk for the long-term value of the company*** that was completely unwarranted and not borne out by the performance of the company."[282]

- "***[S]hort-term-oriented investors not infrequently will take the opportunity to build up, accumulate shares, and may act in a way or attempt to act in a way that is not consistent with the long-term***, best interests of the overall shareholder group."[283]

- "***[T]he rapid accumulation and the very low share price, even in just raw dollars, would potentially invite short-termism and hedge funds to jump in.***"[284]

- "***[Y]ou see the short-termism come out of the woodwork" where "the market was reacting to the macro conditions with a great deal of velocity."***[285]

- The Board discussed the threat of a rapid accumulation of stock at the March 19 meeting and Morgan Stanley advised that the Plan "***would deter an activist from taking advantage of the current market dislocation*** and challenges in monitoring unusual trading patterns that results in a rapid accumulation of a >5% stake."[286]

- "[P]art of the fiduciary duty of the board members is that . . . if an offer is provided to the board and/or to management, that it's our job to consider it and give it due course. The entire purpose of the [P]lan is to ***make sure that that was not done in a way that is only for the interests of the short-term investor taking that action and not in the overall best interests of the entire shareholder group for the longer term***."[287]

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[281] *Id.* at 548:12–16 (Buese) (emphasis added).

[282] *Id.* at 539:5–18 (Buese) (emphasis added).

[283] *Id.* at 539:21–540:2 (Buese) (emphasis added).

[284] *Id.* at 556:23–557:6 (Buese) (emphasis added).

[285] *Id.* at 539:5–13 (Buese) (emphasis added).

[286] *Id.* at 556:7–23 (Buese) (emphasis added).

[287] *Id.* at 566:9–21 (Buese) (emphasis added).

- But the Board was not aware of a "rapid accumulation of Williams stock by any particular investor" at the time the Plan: "***[T]here was no actual threat****. . . .* ***[I]t was a perceived threat*** *. . . .*"[288]

Bergstrom testified that the Plan specifically targeted activists. He echoed the "guardrails" and "rapid accumulation" concerns raised by Smith and Buese. In Bergstrom's words:

- The Plan was "being used to avoid raiders – ***activists getting involved at the company*** because the stock had dropped from $24 to eight and made it much, much easier for somebody to come in who wanted to disrupt the company at that point in time. And that was the . . . concern that I had."[289]

- ***Activist activity was the "big concern from my perspective***. I'm not sure how widely -- how wide that was a concern of the rest of the board. That was clearly mine."[290]

- The Plan "***allows the company to -- the board to negotiate and talk to the shareholder*** who jumps in the middle and wants to do something different dramatically or different than what the company currently is doing."[291]

- When the Plan was adopted, "[t]here was not any specific activist investor threat," but "the result in stock price decline certainly made it much, much easier for that to occur."[292]

- He further explained that "we thought if we did nothing, that the company was at risk for activist investors to do things that were not in the best interest of the total shareholder base. . . . Plus, at that point, you know, the stock price, our cash flow had not changed materially and the stock price had dropped . . . by threefold. And the price was not representative of the value

[288] *Id.* at 544:8–15 (Buese) (emphasis added).

[289] Bergstrom Dep. Tr. at 52:19–53:2 (emphasis added).

[290] *Id.* at 50:11–14 (emphasis added).

[291] *Id.* at 31:9–25 (emphasis added).

[292] *Id.* at 182:5–9.

> of the cash flows going forward. And so we felt like as a board we needed to do something . . . to protect it."[293]

Fuller testified that the Plan was intended to avoid disruption by insulating the management team to allow them to focus on long-term interests. She too testified as to her desire to protect the Company against short-termism and the rapid accumulation of stock. In Fuller's words:

- "The company is dealing with a whole host of very significant and serious, serious issues at this time. And what's being discussed is something to put in place for the short-term to at least make sure that a group of activists don't just take a position without having to declare themselves and their intention. . . . And ***I really wanted this excellent management team to at least be focused on making sure that we weren't vulnerable.***"[294]

- "What was foremost in my mind was making sure that we got the best value for shareholders. And that . . . ***the management team was focused on making sure the company navigated and that shareholders, long-term shareholders*** . . . would not be in a position where there was a sale that was way below what the company was truly worth."[295]

- The "danger" posed was that the stock "was so underpriced that someone could ***amass a fair amount of stock*** and put itself in a position of forcing the board to take action that was *not in the best interest of the long-term shareholders*."[296]

- When asked about threats to corporate policy and effectiveness, she responded that she was "aware of . . . what had happened in a generic sense in 2013. And that it had been pretty really disruptive to the management of the company. ***And thinking about disruption, we are already in a disruptive environment, hugely disruptive, was something that I was concerned would have a negative effect on the operations of the company***."[297]

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[293] *Id.* at 184:10–185:7.

[294] Fuller Dep. Tr. at 233:3–234:19 (emphasis added).

[295] *Id.* at 57:25–58:13 (emphasis added).

[296] *Id.* at 196:3–13 (emphasis added).

[297] *Id.* at 225:16–25 (emphasis added).

A few themes emerge from the Director Defendants' testimony. First, they all expressed the sentiment that the Plan was intended to deter stockholder activism.[298] Second, they desired to insulate the board from activists pursuing "short-term" agendas and from distraction and disruption generally. Third, they were concerned that a stockholder might stealthily and rapidly accumulate large amounts of stock.[299]

b. The Legitimacy of the Actual Threats

The first prong of *Unocal* requires evaluating whether the Board has demonstrated that it conducted a good faith reasonable investigation and had "grounds for concluding that a threat to the corporate enterprise existed."[300] Defendants have demonstrated that the Board conducted a good faith, reasonable investigation when adopting the Plan. The Director Defendants are nearly all independent, outside directors. They considered the Plan over the course of two meetings. Although aspects of the record create the impression that the second Board meeting was window dressing, it is clear that there was genuine

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[298] *See also* JX-187 at 1 (Chandler writing: "limited scope → just activist").

[299] This last purpose features prominently in the documentary record as well. *See* JX-171 at 2 (Krieg writing: "One thing we are interested in is folks who may be getting close to the 5% ownership line in real-time (so surveillance data). Could you all produce a report that shows folks where [sic] are close to crossing the 5% ownership line or folks who look like they might be ramping up their position (close to that line)?"); JX-172 at 3 (Krieg writing: "[C]ould you all take a look at the surveillance data with a view to who might be working their position upward, towards a 5% ownership position?"); JX-65 at 4 (Morgan Stanley March 19 Board presentation stating that "[t]he rights plan would deter an activist from taking advantage of the current market dislocation and challenges in monitoring unusual trading patterns that results in a rapid accumulation of a >5% stake"); JX-117 at 5 (April 15 disclosure stating that the goal was "[t]o prevent an opportunistic party from achieving substantial influence or control without paying a control premium to other stockholders").

[300] *Air Prods.*, 16 A.3d at 104 (quoting *Selectica II*, 5 A.3d at 599).

deliberation concerning the Plan. Defendants were advised by outside legal and financial advisors who were available to answer questions. Certainly, aspects of the process were less than perfect.[301] Still, nothing about the process jumps out as unreasonable.[302]

The real problem is not the process that Defendants followed, but the threats they identified. The first threat was quite general—the desire to prevent stockholder activism during a time of market uncertainty and a low stock price. The second threat was only slightly more specific—the concern that activists might pursue "short-term" agendas or distract management. The third threat was just a hair more particularized—the concern that activists might rapidly accumulate over 5% of the stock and the possibility that the Plan could serve as an early detection device to plug the gaps in the federal disclosure regime.[303] Each of the three threats were purely hypothetical; the Board was not aware of

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[301] *See generally* Pls.' Answering Br. at 23–26.

[302] *See Gaylord*, 753 A.2d at 478–79 (finding a good faith, reasonable investigation under similar circumstances); *Moran II*, 500 A.2d at 1356 (finding a good faith reasonable investigation where the board received information from advisors, was informed as to "the essentials of the [p]lan," and had a "three-page summary" of the plan). To be sure, it would have been better if the Director Defendants read the Plan or at least had a more meaningful discussion of its features before adopting it. But these defects are not fatal. It is generally true that a director does not need to read every work of a dense legal document to demonstrate that the investigation was reasonable. *See Moran I*, 490 A.2d at 1068, 1083 (upholding rights plan even though "some directors were not conversant with the implications of the plan"); *Yucaipa*, 1 A.3d at 343, 361 (upholding plan even though "some directors admittedly had difficulty interpreting" it and observing that such difficulty was "understandable because it [was] a complex agreement"). "Delaware law does not require that a senior decision-maker . . . read every agreement *in haec verba*." *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2012 WL 1869416, at *15 (Del. Ch. May 16, 2012), *aff'd*, 68 A.3d 665 (Del. 2013).

[303] *See* Subramanian Report ¶¶ 79–81.

any specific activist plays afoot. The question presented is whether these hypothetical threats present legitimate corporate objectives under Delaware law.

i. Stockholder Activism

"Stockholder activism" is a broad concept that refers to a range of stockholder activities intended to change or influence a corporation's direction.[304] Activists may pressure a corporation to make management changes, implement operational improvements, or pursue a sale transaction. They may seek to catalyze or halt a merger or acquisition. More recently, "ESG activism" has come to the fore, and stockholders have begun pressuring corporations to adopt or modify policies to accomplish environmental, social, and governance goals.[305] Many forms of stockholder activism can be beneficial to a corporation, as Defendants themselves recognize.[306]

Under Delaware law, the board of directors manages the business and affairs of the corporation.[307] Thus, stockholder activism is directed to the board. And activists' ability

[304] Mills Report ¶ 31; *accord*. Goldfarb Report ¶ 16 ("An activist investor is a shareholder that seeks to induce management and the board of directors to make changes at a company.").

[305] *See* Mills Report ¶ 31; *see also* Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 Wash. & Lee L. Rev. 1259, 1289–90 (2019) (referring to ESG activism as "[t]he new wave of corporate social activism" involving "the public-private spheres, evolution of corporate social responsibility efforts, and expansion of corporate political rights"). Former-Chief Justice Strine has also suggested that the "E" in "ESG" refers to employee-related action. *See* Leo E. Strine, Jr. *Toward Fair and Sustainable Capitalism* 6 (U. Pa. Inst. For L. & Econ. Res., Paper No. 19-39, 2019) (reframing ESG as "EESG," noting "the vital missing 'E'—the interests of companies' employees").

[306] *See* Trial Tr. at 73:7–10 (Cogut); *id*. at 536:2–16, 581:17–23 (Buese).

[307] 8 *Del. C.* § 141(a).

to replace directors through the stockholder franchise is the reason why boards listen to activists. Most activists hold far less than a hard majority of a corporation's stock, making the main lever at an activist's disposal a proxy fight. In this way, stockholder activism is intertwined with the stockholder franchise.

Under Delaware law, directors cannot justify their actions by arguing that "without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief" in an uncoerced, fully informed election.[308] "The notion that directors know better than the stockholders about who should be on the board is no justification at all."[309]

Viewing all stockholder activism as a threat is an extreme manifestation of the proscribed we-know-better justification for interfering with the franchise. That is, categorically concluding that *all* stockholder efforts to change or influence corporate direction constitute a threat to the corporation runs directly contrary to the ideological underpinnings of Delaware law. The broad category of conduct referred to as stockholder activism, therefore, cannot constitute a cognizable threat under the first prong of *Unocal*.

To be sure, Delaware law does not categorically foreclose the possibility that certain conduct by activist stockholders might give rise to a cognizable threat. Defendants cite to four cases where a Delaware court upheld defensive actions taken in response to types of stockholder activism.[310] All involved different scenarios and more specific threats.

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[308] *Pell v. Kill*, 135 A.3d 764, 788 (Del. Ch. 2016).

[309] *Mercier*, 929 A.2d at 811.

[310] *See* Defs.' Opening Br. at 32–36 (citing *Third Point*, 2014 WL 1922029, at *21–22; *Yucaipa*, 1 A.3d at 343; *Polk v. Good*, 507 A.2d 531, 537 (Del. 1986); *Cheff v. Mathes*, 199 A.2d 548, 556 (Del. 1964)).

Defendants first cite to *Polk*, a stockholder challenge to Texaco's agreement to repurchase the shares of the Bass Brothers, well-known takeover artists and greenmailers,[311] and who had acquired just under 10% of the company's stock.[312] The Bass brothers were poised to launch "some hostile . . . move" on Texaco at a time when the company was "vulnerable" because "management was consumed with . . . obtaining government and shareholder approval" of its $10 billion acquisition of Getty Oil Company—at the time, "one of the biggest corporate acquisitions in history."[313] The purchase of the Bass Brothers' shares drew multiple stockholder lawsuits. The company settled the lawsuits by agreeing to provide extensive supplemental disclosures and modify a standstill agreement that was part of the transaction.[314] This court approved the settlement over the objection of certain Texaco stockholders, and the objectors appealed.

On appeal, the high court found that the board reasonably identified a cognizable threat under *Unocal* based on the "disruptive effect and the potential long-term threat" posed by the Bass Brothers.[315] In support of this conclusion, the high court simply cited

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[311] *See* Peter Applebome, *Texas Deal Maker: Robert M. Bass; A Younger Brother Steps Out on His Own*, N.Y. Times (June 5, 1988), https://www.nytimes.com/1988/06/05/business/texas-deal-maker-robert-m-bass-a-younger-brother-steps-out-on-his-own.html; *see also* Michael H.Q.L. Lau, *Adequate Remedies For Tender Offer Abuse: Resurrecting Manipulation and Reforming The Business Judgment Rule*, 9 U. Haw. L. Rev. 209, 216 n.59 (1987) (referring to the Bass Brothers as "examples of major investors who profited greatly in 1984 from tremendous greenmail profits").

[312] *Polk*, 507 A.2d at 533.

[313] *Id.* at 533–34.

[314] *Id.* at 535.

[315] *Id.* at 537.

Unocal, which involved defensive measures adopted in response to takeover activity. The high court's abbreviated reference to *Unocal* suggests that the Delaware Supreme Court credited that the Bass Brothers presented a takeover threat. The lack of more extensive analysis also is not surprising because *Polk* involved an appeal from a decision approving a negotiated settlement. The court thus applied a doubly-deferential legal standard: settlements are approved at the discretion of the trial court, and those decisions are reviewed on appeal with deference.[316] The *Polk* case does no validate a generalized concern about activism as a threat that supports a defensive response.

Defendants next cite to *Cheff*, where the board of Holland Furnace Company ("Holland") rejected a merger proposal from Arnold H. Maremont of Maremont Automotive Product, Inc. ("Motor Products").[317] Unbeknownst to the Holland board at the time, Motor Products had acquired a large block of Holland shares on the open market, and after Holland rebuffed Maremont's merger proposal, Maremont began using his stock holding to agitate for control and a restructuring of the company. He demanded that he be named to the Holland board, "threat[ened] to liquidate the company," and threatened to "substantially alter" Holland's sales force, which Holland viewed as a "vital factor in the company's success."[318] Maremont's threats caused *operational* disruption—"substantial

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[316] *Polk*, 507 A.2d at 536 (observing that "our standard of review is whether under all the facts and circumstances the Chancellor abused his discretion" and "we must find the evidence so strongly to the contrary as to amount to an abuse of discretion" (citing *Rome v. Archer*, 197 A.2d 49, 54 (Del. 1964)).

[317] *Cheff*, 199 A.2d at 551–53.

[318] *Id.*

unrest . . . among the employees" that caused twenty-five of the Holland's "key men" to resign.[319]

As in *Polk*, the Holland board responded to Maremont's activity by repurchasing his shares at a premium, and the repurchase precipitated derivative stockholder actions alleging that the repurchase constituted a breach of fiduciary duties.[320] The trial court held in the plaintiffs' favor. On appeal, the Supreme Court found that the Holland board acted with justification in response to a reasonable threat to Holland's existence: "[T]he board . . . believed, with justification, that there was a reasonable threat to the continued existence of Holland, or at least existence in its present form, by the plan of Maremont to continue building up his stock holdings."[321] Like *Polk*, *Cheff* did not involve generalized concern about activism. It involved a concrete takeover attempt and a specific and on-going threat.

Defendants further cite to *Yucaipa*, where Ron Burkle's activist hedge fund Yucaipa had acquired a 17.8% stake in Barnes & Noble and disclosed in its 13D that it might acquire as much as 50%.[322] Another hedge fund with a history of piggybacking on Yucaipa's investments increased its stake from 6.37% to 17.44% of the company.[323] In response, the

[319] *Id.* at 551–52.

[320] *Id.* at 552–53.

[321] *Id.* at 556.

[322] *Yucaipa*, 1 A.3d at 318, 323.

[323] *Id.* at 324–25.

company adopted a pill with a 20% threshold while grandfathering the 30% stake of the company's founder and CEO.[324] Yucaipa brought litigation challenging the pill.

After trial, the court upheld the pill under *Unocal*. When evaluating the first prong of *Unocal*, the court found that the board acted with justification in response to the threat of a "creeping acquisition" and that the pill was a reasonable response.[325] Like *Polk* and *Chef*, *Yucaipa* involved a specific takeover attempt—there through a creeping acquisition—that manifested as a concrete threat. Nothing in *Yucaipa* validates a general concern regarding stockholder activism.

Defendants lastly cite to *Third Point*, as case that resembles *Yucaipa*. Dan Loeb's activist hedge fund Third Point acquired just under 10% of Sotheby's stock, publicly filed a "poison pen" letter decrying various board decisions, began spreading rumors that he intended to replace management, and launched a proxy contest to replace three incumbents on Sotheby's twelve-person board.[326] Sotheby's also detected "several hedge funds" in addition to Third Point "accumulating its stock simultaneously."[327] Sotheby's board adopted a pill with a 10% threshold.[328] Loeb requested a waiver of the pill, which the board refused.[329] Third Point brought litigation challenging the adoption and refusal to waive the pill and sought to preliminarily enjoin the annual meeting pending resolution of its claims.

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[324] *Id.* at 320–21.

[325] *Id.* at 352–53, 359–60.

[326] *Third Point*, 2014 WL 1922029, at *6–9.

[327] *Id.* at *17.

[328] *Id.* at *10.

[329] *Id.* at *14.

On a decision denying the motion for preliminary injunction, this court concluded that the plaintiffs were not likely to succeed on their claims. When evaluating the first prong of *Unocal*, the court found that the board was justified in adopting the pill for the purpose of defending against "creeping control."[330] The court acknowledged, however, that the creeping-control threat was no longer present when the board determined not to waive the pill at Loeb's request. By that time, the threat had morphed into a concern that Third Point would improperly exercise "effective, rather than explicit, negative control" as Sotheby's largest stockholder.[331] The court cautioned against viewing "effective negative control" as "a license for corporations to deploy defensive measures unreasonably" and observed that the circumstances in *Third Point* rendered the threat legitimate in part because Loeb had acted in an "aggressive and domineering manner."[332] *Third Point* thus involved a specific takeover attempt that started as an effort to obtain creeping control. The *Third Point* decision does not validate a general concern about activism as a legitimate threat.

None of these decisions support the notion that generalized concern about stockholder activism constitutes a cognizable threat under *Unocal*. Rather, these cases demonstrate that a board has authority to respond to a specific takeover attempt, even when the attempt does not involve a traditional tender offer. Read broadly, the cases support the proposition that a Board can adopt defensive measures in response to concrete action by a

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[330] *Id.* at *17.

[331] *Id.* at *22.

[332] *Id.*

stockholder activist. The Board's general concern about stockholder activism is insufficient.

ii. Short-Termism and Distraction

The Board's second concern was that activists might pursue short-term agendas or disrupt or distract management. The "short-termism" justification refers to the concern that "a particular activist seeks short-term profit without regard to the impact on the company's long-term prospects."[333] The "disruption" justification typically refers to the concern that the actions of the activists might cause operational disruption, as in *Cheff*. Here, the Director Defendants instead frame this concern as a desire to insulate the management team from distraction.[334]

No case has evaluated under *Unocal* whether these types of particularized activist concerns constitute cognizable threats. The threats validated in Defendants' four cases discussed above involved threats that differed materially from the factual context here.

Each of Defendants' cases, unlike this case, involved takeover threats. In *Polk*, the Bass Brothers had obtained a substantial equity stake in the company.[335] In *Cheff*, an

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[333] *Anti-Activist Poison Pills* at 931 (internal quotation marks omitted).

[334] *See supra* notes 269, 271, 275, 294, 295 and accompanying text.

[335] *See Polk*, 507 A.2d at 533–34. As discussed above, the *Polk* court found the "disruptive effect and the potential long-term threat" posed by a stockholder as cognizable under the first prong of *Unocal*. *Id*. at 537. Although this passing language seems supportive of Defendants' position, the facts of this case reveal that the board of Texaco acted in response to a takeover threat. Also, the court's reasoning on this point was underdeveloped, perhaps because *Unocal* was nascent and the court was applying a highly deferential legal standard. Consequently, this court does not view reference to a "potential long-term threat" and "disruptive effect" in *Polk* as supporting of a holding that such threats standing alone are cognizable under Delaware law. *See id.*

acquirer had made a merger proposal and acquired a substantial bock, then used that block to advocate for a takeover, resulting in operational disruptions were so severe as to threaten the corporation's existence.[336] In *Yucaipa* and *Third Point*, the directors responded to creeping takeovers, which in *Third Point* could have left the activist with "effective negative control."[337] None of the cases involved a response to activism *per se*.[338] Moreover, each of Defendants' cases, unlike this case, involved defensive measures adopted in response to a specific activist or group of activists. The threat was not hypothetical.[339]

Reasonable minds can dispute whether short-termism or distraction could be deemed cognizable threats under Delaware law. These sorts of justifications, particularly short-termism, are conspicuous in the policy debate,[340] but they become nebulous when

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[336] *Cheff*, 199 A.2d at 551, 556.

[337] *See Third Point*, 2014 WL 1922029, at *21–22; *Yucaipa*, 1 A.3d at 352–53.

[338] *See, e.g., Anti-Activist Poison Pills* at 934–36 (discussing the presence of "creeping control" concerns in *Third Point* and *Yucaipa*).

[339] *See Third Point*, 2014 WL 1922029, at *18, 21–22; *Yucaipa*, 1 A.3d at 348; *Polk*, 507 A.2d at 537; *Cheff*, 199 A.2d at 551–52, 556. Although *Cheff* was decided in 1964, over twenty years before *Unocal*, it was cited favorably in *Unocal* and thus bears continued relevance on the application of intermediate scrutiny. *See Unocal*, 493 A.2d at 953–54 (citing *Cheff* for the proposition that, when adopting defensive measures, "a Delaware corporation may deal selectively with stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office").

[340] *See, e.g.*, Martin Lipton, *The Threat to the Economy and Society from Activism and Short-Termism Updated*, Harv. L. Sch. F. on Corp. Governance (Jan. 27, 2015) https://corpgov.law.harvard.edu/2015/01/27/the-threat-to-the-economy-and-society-from-activism-and-short-termism-updated/; Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed For The Long Term Unless their Powerful Electorates Also Act and Think Long Term?*, 66 Bus. Law. 1 (2010). *See generally Anti-Activist Poison Pills* at 930.

viewed through a doctrinal lens. The central criticism of short-termism is that "shareholders who favor short-termism . . . are hurting themselves as much as they are hurting their fellow shareholders."[341] This is a valid policy argument, but as one group of scholars have commented, the "'short-termism' argument just particularizes the concern that shareholders will cast votes in a mistaken assessment of their own best interests."[342] That is, short-termism and distraction concerns boil down to the sort of we-know-better justification that Delaware law eschews in the voting context.

Although there is room to disagree as to whether short-termism or distraction could be deemed cognizable threats under Delaware law, this decision does not resolve that issue. Even if justifications of short-termism or disruption could rise to the level of a cognizable threat, hypothetical versions of these justifications cannot. The concerns in this case are raised in the abstract—there is no "specific, immediate" activist play seeking short-term profit or threatening disruption.[343] When used in the hypothetical sense untethered to any concrete event, the phrases "short-termism" and "disruption" amount to mere euphemisms for stereotypes of stockholder activism generally and thus are not cognizable threats.

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[341] *Anti-Activist Poison Pills* at 931–32.

[342] *Id.* at 931.

[343] Trial Tr. at 544:12–15 (Buese) ("No, there was no actual threat. From our perspective, it was a perceived threat . . . .").

iii. Rapid Accumulation of Stock

The third justification for the Plan is the concern that activists might rapidly accumulate over 5% of the stock and the belief that the Plan could serve as an early-detection devise to plug the gaps in the federal disclosure regime.

In his March 2015 Harvard Business Review article, *Corporate Governance 2.0*, Professor Subramanian advocates for boards of public companies to adopt what he calls an "advance notice" pill with a 5% threshold.[344] He argues that "when an activist investor threatens a proxy contest or a strategic buyer makes a hostile tender offer," boards often react with a "no-holds-barred, scorched-earth" defense rather than providing stockholders with an "orderly shareholder voice."[345] As a contributing factor to this problem, he cites "lightning strike attacks," which are rapid, undetected accumulation of stock in a short period of time, the precise concern articulated by the Board in this action.[346] *Corporate Governance 2.0* cites to one instance of a lightning-strike raid in 2010 involving J.C. Penney, where two activist groups acquired more than a quarter of the company's shares before the ten-day disclosure requirement expired.[347]

Lightning strikes go undetected under the federal disclosure regime, which requires stockholders to disclose their ownership position after crossing the 5% threshold but gives

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[344] JX-169 ("*Corporate Governance 2.0*") at 15.

[345] *Id.* at 12–14.

[346] *Id.* at 15.

[347] *Corporate Governance 2.0* at 14–15. The J.C. Penney anecdote demonstrates that lightning-strike attacks can happen, though the record lacks empirical evidence of their frequency or likelihood generally or Williams' susceptibility to such an event.

stockholders ten days to do so. The federal disclosure regime does not prohibit stockholders from continuing to acquire stock during that ten-day period and does not capture "wolf pack" activity.[348]

To avoid lightning strikes and promote an "orderly shareholder voice," Subramanian recommends that boards effectuate a private-ordering response in the form of an advance-notice pill.[349] A similar private-ordering solution to perceived defects in the federal disclosure regime was endorsed by Professors John Coffee and Dairus Palia in their Spring 2016 article, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance* ("*Wolf at the Door*").[350] This decision refers to the private-ordering solutions discussed in both *Corporate Governance 2.0* and *Wolf at the Door* as "gap-filling pills."

This decision need not address whether a true gap-filling pill would be permissible. As discussed below, the features of the Plan are more extreme than any of the gap-filling pills discussed in *Corporate Governance 2.0* or *Wolf at the Door*. At this stage of the analysis, the question is whether the desire to fill gaps in federal disclosure laws through private ordering constitutes a legitimate corporate objective under *Unocal*. A related question is whether the gap-filling objective becomes more viable in the face of market

[348] *Corporate Governance 2.0* at 15.

[349] *Id.*

[350] John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. Corp. L. 545, 601–02 (2015).

uncertainty or a precipitous stock drop resulting in a stock price that undervalues the corporation.

Reasonable minds can dispute whether a gap-filling purpose standing alone is a legitimate corporate purpose under *Unocal*. The main concern is that if gap filling were a legitimate corporate objective that justified the adoption of a poison pill, then all Delaware corporations subject to the federal disclosure regime would have a ready-made basis for adopting a pill. These policy concerns are only slightly mitigated by a precipitous stock drop, which is not an uncommon occurrence.

Recognizing an omnipresent justification for poison pills would constitute a dramatic turn in Delaware law, which has consistently held that a pill's adoption and maintenance raises concerns sufficient to give rise to enhanced scrutiny. This court routinely views poison pills as situationally specific defenses and has conducted fact-intensive inquiries to determine whether the action is justifiable under the unique circumstances of the case. Put differently, Delaware law has handled these "nuclear weapon[s] of corporate governance" with the delicacy they deserve.[351] Delaware's approach has created an appropriate culture of caution in the board room. For example, last year prominent defense firms recommended against the reflexive adoption of a pill in response to COVID-19, noting the need for "[c]ompany-specific circumstances as well as indicia of emerging or present threats" to justify a pill's adoption.[352]

[351] *See* Trial Tr. at 53:18–55:10, 114:10–12 (Cogut).

[352] *See, e.g.*, David Katz & Sebastian V. Niles, *Rights Plans ("Poison Pills") in the COVID-19 Environment—"On the Shelf and Ready to Go"?*, Harv. L. Sch. F. on Corp. Governance (Apr. 2, 2020), https://corpgov.law.harvard.edu/2020/04/02/rights-plans-

Just as this decision need not decide in the abstract whether a gap-filling pill is permissible, this decision also need not address whether gap-filling represents a legitimate corporate objective. This decision instead assumes for the purposes of analysis that gap filling to detect lightning strikes at a time when stock price undervalues the corporation is a legitimate corporate purpose under the first prong of *Unocal*. The question becomes whether the adoption of the Plan was a proportional response to that assumedly valid threat.

2. The Proportionality of the Response

Because Plaintiffs do not claim that the Plan is coercive or preclusive,[353] the second prong of the *Unocal* inquiry requires the court to evaluate whether Defendants proved that adopting the Plan fell within a range of reasonable responses to the lightning-strike threat posed.[354]

The thirty-thousand-foot view looks bad for Defendants. As Morgan Stanley advised the Board at the March 19 Meeting, the 5% trigger alone distinguished the Plan; only 2% of all plans identified by Morgan Stanley had a trigger lower than 10%.[355] Even among pills with 5% triggers, the Plan ranked as one of only nine pills to ever utilize a 5%

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poison-pills-in-the-covid-19-environment-on-the-shelf-and-ready-to-go/ (issuing general guidance to companies initially responding to the COVID-19 pandemic).

[353] Plaintiffs failed to brief and thus waived these arguments. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *accord. Adams v. Calvarese Farms Maint. Corp.,* 2010 WL 3944961, at *21 (Del. Ch. Sept. 17, 2010) ("Because [plaintiff] did not address these items in her post-trial briefs or otherwise cogently present evidence and argument regarding them in connection with the trial, she has waived them.").

[354] *See Unitrin*, 651 A.2d at 1387–88 (quoting *Paramount*, 637 A.2d at 45–46).

[355] JX-57 at 4 (noting that "[n]o precedents exist below 5%").

trigger outside the NOL context.[356] Among Delaware corporations, it was one of only two. The other Delaware corporation to adopt a 5% trigger for a non-NOL pill did so in distinguishable circumstances—in the face of a campaign launched by an activist who held 7% of the company's outstanding shares at the time the pill was adopted.[357] Of the twenty-one pills adopted between March 13 and April 6, 2020, only the Plan had a 5% triggering threshold.[358] Of the twenty-one companies that adopted pills during that time, thirteen faced ongoing activist campaigns when adopting their pill.[359]

The Plan's other key features are also extreme. The Plan's "beneficial ownership" definition goes beyond the default federal definitions to capture synthetic equity, such as options.[360] The Plan's definition of "acting in concert" goes beyond the express-agreement default of federal law to capture "parallel conduct" and add the daisy-chain concept. The Plan's "passive investor" definition goes beyond the influence-control default of federal law to exclude persons who seek to direct corporate policies. In sum, the Plan increases the range of Williams' nuclear missile range by a considerable distance beyond the ordinary poison pill.[361]

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[356] Mills Report ¶ 47.

[357] *Id.*

[358] JX-92 at 3.

[359] *Id.*

[360] *See Anti-Activist Poison Pills* at 949–50.

[361] *See* Mills Report ¶¶ 35, 47 ("Among the COVID Pills, the Williams Pill is by far the most restrictive. The Williams Pill contains a suite of features that, in combination, appears to be unprecedented.").

The fact that the Plan's features depart from the default federal disclosure regulations is consistent with a gap-filling purpose, but the Plan's features do not compare well against those of gap-filling pills. As discussed above, in 2015 and 2016, Professor Subramanian in *Corporate Governance 2.0* and Professors Coffee and Palia in *Wolf at the Door* each endorsed different versions of a gap-filling pill. The Plan's features exceed what commentators have proposed.

Professor Subramanian described one gap-filling pill in *Corporate Governance 2.0*. His advance-notice pill had a 5% threshold tempered by an exemption for stockholders that disclose their position within two days of crossing the threshold.[362]

The authors of *Wolf at the Door* discuss two gap-filing pills. The first proposal is a "standing" poison pill that defines a "group" more broadly than the express-agreement default of federal disclosure law.[363] This standing pill would "preclude any shareholder—with some possible exemption for 'passive' shareholders—from exceeding a specified level (either 15% or possibly 10%)" and would include an "acting in concert" provision defined broadly so as to capture persons acting "'in conscious parallelism' with the leader of the 'wolf pack.'"[364] The authors observe, however, that the standing pill "will create considerable uncertainty and place high demands on courts."[365]

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362 *Corporate Governance 2.0* at 15. Although the article is silent as to the pill's other features, one can assume that the designer had parallel-conduct AIC provisions and other expansive features in mind. *See* Subramanian Report ¶¶ 37–39, 50, 81.

363 *Wolf at the Door* at 601–02.

364 *Id.*

365 *Id.* at 602.

The authors' second proposal is a window-closing pill, which builds off of a proposal made in 2010 by a New York law firm following the J.C. Penney lightning-strike attack.[366] This pill would maintain the express-agreement acting in concert default of the federal disclosure regime but include a lower trigger threshold "of as little as 5.1% of the target's stock if the acquirer did not file a Schedule 13D *before* purchasing stock in excess of the specified threshold."[367] The window-closing pill "has a limited objective . . . of compelling disclosure so that a board of directors, stockholders and the trading markets

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[366] *See id.*; Peter S. Golden, *The Window Closing Pill – One Response to Stealth Stock Acquisitions*, Harv. L. Sch. F. on Corp. Governance (Jan. 6, 2011), https://corpgov.law.harvard.edu/2011/01/06/the-window-closing-pill-one-response-to-stealth-stock-acquisitions/ [hereinafter *The Window Closing Pill*]. The concept of a window-closing pill has been endorsed by commentators, including former Chief Justice Strine in his extra-judicial writing. *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 Yale L.J. 1870, 1963–64 (2017); Arthur Fleischer, Jr., Alexander R. Sussman & Gail Weinstein, *Takeover Defense: Mergers and Acquisitions* § 5.01[A][1] (8th ed. 2018) (describing the window-closing pill as "essentially benign, since the acquiror is not precluded from acquiring more than 5% of the target's outstanding voting securities once position disclosure has been made"); Simon M. Lorne and Joy Marlene Bryan, 11A *Acquisitions & Mergers: Negotiated and Contested Transactions* § 5:68.60 (2020) ("The plan is benign because the acquirer is not precluded from acquiring more than a five percent voting or financial interest in a company and it would not create an impediment to purchasing shares pursuant to a tender offer."); William R. Tevlin, Note, *The Conscious Parallelism of Wolf Packs: Applying the Antitrust Conspiracy Framework to Section 13(D) Activist Group Formation*, 84 Fordham L. Rev. 2335, 2349 (2016) (noting that "corporations may utilize" a window pill "to fight off wolf packs"). *But see* Maria Lucia Passador, *The Woeful Inadequacy of Section 13(D): Time for a Paradigm Shift?*, 13 Va. L & Bus. Rev. 279, 295 (2019) (commenting that "shortening the reporting window would affect the ability of investors to launch campaigns for corporate control, reducing the staggering profits accumulated as a result of their toehold, and making the accumulation of shares more expensive").

[367] *Wolf at the Door* at 602 (emphasis added).

can evaluate the ownership position of a substantial non-passive investor."[368] As originally conceived, the window-closing pill would have a "transitory five plus percent flip-in trigger," meaning that it is only triggered if a stockholder exceeds 5% ownership within the ten-day window before disclosing the triggering acquisition.[369]

The authors recognize that the window-closing pill too "would be subject to legal challenge" and would "anger the proxy advisors (who would then recommend that institutions withhold their votes for the directors of this corporation)."[370] Accordingly, they identify a series of "compromises" designed to mitigate the impact of the window-closing pill.[371] For example, the window-closing pill "might compensate for its short fuse by allowing the bidder to accumulate a greater level of stock (say, 15 or 20%), so long as it filed with the SEC immediately after crossing 5%."[372] Alternatively, it "might permit a 100% bid to be made" upon the bidder's disclosure.[373] In the authors' view, "[e]ither concession should lead the Delaware courts to accept such a pill because neither pill is 'preclusive.'"[374]

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368 *The Window Closing Pill*.

369 *Id.*

370 *Wolf at the Door* at 602.

371 *Id.*

372 *Id.*

373 *Id.*

374 *Id.* (quoting *Unitrin*, 651 A.2d at 1387).

The Plan includes more aggressive features than any of the gap-filling pills. The standing pill includes a higher trigger threshold of "either 15% or possibly 10%."[375] The window-closing pill contemplates a comparable threshold ("as little as 5.1%."), but a less inclusive acting-in-concert provision (an express-agreement provision).[376] To that structure, the authors recommended a series of potential compromises. Even the most extreme of the gap-filling pills, the advance-notice pill, contemplates an exemption for "shareholders that disclosed their positions within two days of crossing the threshold."[377]

Had the Board desired to close some of the gaps in the federal disclosure regime, the Board might have considered one of the less extreme options aimed at detection and designed to compel stockholder disclosure. Instead, the Board selected a Plan with features that went beyond those of gap-filling pills. Regardless of whether the Board intended to gap fill federal disclosure regulations—and whether that intent is permissible—the Plan's combination of features created a response that was disproportionate to its stated hypothetical threat.

The Plan's features also raise concerns when evaluated independently and divorced from comparisons. As Plaintiffs' proxy solicitor testified at trial, the Plan's combination of features are likely to chill a wide range of anodyne stockholder communications.[378]

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[375] *Id.* at 601–02.

[376] *Id.* at 602.

[377] *Corporate Governance 2.0* at 15.

[378] *See* Trial Tr. at 209:7–23, 231:6–14, 233:4–11, 255:7–12 (Mills); *see also* Mills Report ¶¶ 55–56, 64–68, 73 (describing various forms of pre-proxy contest stockholder activism that the Plan's combination of features deters).

Although the 5% trigger is a marked departure from market norms, it is not the most problematic aspect of the Plan, because a 5% ownership limit still permits an activist to buy a larger dollar value toehold in Williams than the vast majority of other poison pills with higher triggers.[379] The primary offender is the AIC Provision, whose broad language sweeps up potentially benign stockholder communications "relating to changing *or influencing* the control of the Company."[380] The definition gives the Board discretion to determine whether "plus" factors as innocuous as "exchanging information, attending meetings, [or] conducting discussions" can trigger the Plan.[381] This language encompasses routine activities such as attending investor conferences and advocating for the same corporate action.[382] It gloms on to this broad scope the daisy-chain concept that operates to aggregate stockholders even if members of the group have no idea that the other stockholders exist.[383]

In their 2019 doctrinal and policy analysis of anti-activist poison pills, Professors Marcel Kahan and Edward Rock express concerns over the breadth of a nearly acting-in-concert provision.[384] In their view, "wolf-pack provisions suffer from two fatal flaws, each

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379 *See* Trial Tr. 369:15–371:20, 377:9–24 (Subramanian).

380 *See* JX-69 at 18 (emphasis added).

381 *Id.*

382 Trial Tr. at 190:8–14, 196:2–15, 266:8–267:5 (Mills); Mills Report ¶¶ 58–59.

383 *See* Trial Tr. 103:14–18 (Cogut) (agreeing that stockholders have no way to know with any certainty with whom they are aggregated); *id.* 608:4–610:14 (Buese) (same); Fuller Dep. Tr. at 139:24–140:6 (same).

384 *See Anti-Activist Poison Pills* at 962–66. In a blog posted at the beginning of the pandemic and after Williams had adopted the Plan, Professor Rock wrote that the pandemic presented "a time to put the ordinary debate [about rights plans] aside" and for stockholders

of which would on its own be sufficient to render them invalid."[385] First, they "do not clearly specify what activities would result in aggregation."[386] Key terms like "parallel," "relating to," and "influencing" are hard to apply, and "plus factors like 'exchanging information' and 'attending meetings'" are quite broad.[387] "Because triggering a pill would have severe adverse consequences, such vague provisions would have a chilling effect on an activist's ability to communicate with other shareholders."[388] Second, "the very purpose of wolf-pack provisions—to make illicit parallel actions that are not the product of an agreement—is based on a fundamental misconception of how shareholders *ought* to interact."[389] Expounding on this last criticism, the authors explain that "[t]hese sorts of

and proxy advisory firms "to provide boards with space to respond to the multiple challenges of protecting firms, employees, consumers, and the country" without "worrying that they will soon find an activist on their doorstep demanding answers." JX-94 at 2–3. Professor Rock then forwarded this blog to Cogut. *Id.* at 1. Defendants treat this exchange as a recantation of the conclusions drawn by Professors Kahan and Rock in their 2019 article, but that is an exaggeration. Professor Rock's blog is best understood as an appeal to activists and boards alike to use common sense during a global emergency. *See, e.g.*, *id.* (cautioning that "boards shouldn't take advantage of this crisis to erect entrenched defensive measures like staggered boards that shareholders have clearly rejected").

[385] *Anti-Activist Poison Pills* at 964.

[386] *Id.*

[387] *Id.*

[388] *Id.*; *see also In re Versum Materials, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL, at 53–54 (Del. Ch. July 16, 2020) (TRANSCRIPT) (expressing concern over the breadth of a nearly identical AIC provision and explaining: "What the act[ing]-in-concert provision attempts to cut off, or at least threaten, is all of the activities that lead up to the giving of the revocable proxy or the making of the revocable tender. So it nominally preserves the end product . . . but . . . interdicts all of the preliminary steps that lead to the customary rendering of that proxy . . . .").

[389] *Anti-Activist Poison Pills* at 964.

provisions threaten to chill the sort of shareholder interaction upon which sound corporate governance depends and that decades of reform have sought to encourage."[390]

To illustrate both fatal flaws and the effect of wolfpack provisions on stockholder activity, the authors present a hypothetical about Remus and Lupin, which this decision takes the liberty of altering to illustrate the same points.[391] Imagine that Remus and Lupin each own 3% of Williams stock. Each is aware of the other's activities solely from rumors and public disclosures. Remus sends a letter to Williams asking for ESG initiatives and threatening to buy up stock and run a proxy contest if the Board does not adopt his proposal. Lupin has reviewed and agrees with Remus's proposal.

Can Lupin meet with the Board, Remus, or other Williams stockholders to discuss Remus's ESG proposal without triggering the Plan? Probably not. Can Remus communicate with other stockholders to determine whether there is support for his ESG proposal before launching the proxy context without fear of triggering the Plan? Not without risk of aggregating those stockholders under the AIC Provision.

Defendants have a few responses to these criticisms of the AIC Provision. First, they say that the Plan does not preclude any stockholder from launching a proxy contest, and that "[a]ny purported impact the Plan might have on routine activism, short of a proxy contest, is irrelevant under *Unocal*."[392] That argument misunderstands the proportionality inquiry of *Unocal*, which is not limited to the analysis conducted in *Moran*; rather, the

390 *Id.* at 964–65.

391 *See id.* at 965.

392 Defs.' Opening Br. at 43.

proportionality analysis is tied to a pill's purpose, and with new purposes come new considerations.[393] Moreover, as Plaintiffs' expert opined, activity leading up to a proxy contest can impede a stockholder's ability to launch a proxy contest by cutting off private communications in advance of proxy contests.[394] Mills explained that stockholders frequently "take the temperature" of other stockholders in advance of launching a proxy contest in light of the risk of financial and reputational damage resulting from a failed contest.[395]

Second, Defendants observe that the AIC Provision is limited to actions that "relating to changing or influencing control" of Williams.[396] Defendants contend that most routine forms of stockholder activism do not involve changing or influencing control of a company. Defendants argue that the AIC Provision contains several other "guardrails" limiting its applicability even when stockholders' do act in ways "relating to changing or

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[393] *See, e.g., eBay*, 16 A.3d at 31 (stating that "[t]he intermediate standard of review is not limited to the historic and now classic paradigm").

[394] *See generally* Trial Tr. at 190:3–14, 212:10–13, 276:9–277:10 (Mills); *see also* Mills Report ¶¶ 64–66.

[395] Mills Report ¶ 64. Defendants' expert proxy solicitor disputes these conclusions. In his view, the AIC Provision would not substantially impede a stockholders' ability to obtain information to assess the likelihood of success before launching a proxy contest. Goldfarb Report ¶ 45. Goldfarb argues that proxy solicitors could aid in this effort, in part by reaching out stockholders who fall within the definition of "passive investor." *Id.* Goldfarb was a highly qualified and credible witness, but this aspect of his testimony ignores the possibility that proxy solicitors would trigger the daisy chain provision, *see* Trial Tr. 196:16–197:8 (Mills), and relies on a definition of "passive investor" that this decision has rejected.

[396] Defs.' Opening Br. at 47, 51; Trial Tr. at 566:23–567:19 (Buese); *id.* 396:10–16 (Subramanian).

influencing control" of the Company.[397] To echo the concerns of Professors Kahan and Rock, however, terms like "relating to" and "influencing," along with the other broad guardrails, are nebulous and broad. Moreover, Cogut conceded at trial that facts similar to the above hypothetical would change or influence control of a company and be included within the AIC Provision.[398]

Third, Defendants argue that the Board would never trigger the Plan in response to an activist play like the Remus Lupin hypothetical.[399] They describe such an outcome is "farfetched," and they say that the court should not presume that the Board would misuse its power under the Plan.[400] But this line of logic would excuse nearly any combination of poison pill terms and does not support a finding that the Plan's terms were reasonable in relation to the threat posed.[401] It also provides cold comfort to Remus and Lupin, and

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[397] Defs.' Opening Br. at 52–54.

[398] Trial Tr. 169:20–170:20 (Cogut).

[399] *See* Defs.' Opening Br. at 49–52.

[400] Defs.' Opening Br. at 49 (quoting Trial Tr. at 254:13–258:4 (Mills) ("[I]t might be farfetched that they would trigger. But it's not farfetched that they would call [an activist] on their behavior and say, 'look what our pill says and look what you're doing. . . . [Y]ou should shut up or bring your position below 5 percent.'")).

[401] Defendants' argument overlooks the stifling impact the Plan has on stockholder communications, a chilling effect that exists whether the Board triggers the Plan or not. *See, e.g., id.*; Mills Report ¶¶ 68, 73 (concluding that the Plan is likely to stifle normal stockholder communications); Mills Rebuttal Report ¶¶ 48–51 (concluding that the "guardrails" in the AIC Provision place investors at the mercy of the Board's broad discretion, noting that Board discretion and after-the-fact litigious remedies don't "address or mitigate the current chilling effect of the Wolfpack Provisions on stockholder activism and the free exercise of the stockholder franchise").

stockholders like them, who cannot rely on the Board's benevolence and must regulate their behavior based on what the Board could do.[402]

The Passive Investor Definition sets another easily activated tripwire. Mills cites to a concrete example of this concern. On the day the Plan was announced, a representative of BlackRock, which holds over 5% of Williams' outstanding common stock [and a 13G filer], criticized Williams for failing to be fully transparent concerning the adoption of the Plan, stating "[t]his doesn't look good from an ESG perspective."[403] This email reflects BlackRock "exercising the power to direct or cause the direction of the management and policies of the Company" and thus excludes BlackRock from the Passive Investor Definition.[404] While it is probably true that the Board would exempt Blackrock and not risk angering a major stockholder player, other stockholders may not be so fortunate.

In the end, Defendants "bear the burden to show their actions were reasonable."[405] They have failed to show that this extreme, unprecedented collection of features bears a

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[402] *See, e.g., id.*; Mills Report ¶¶ 68, 73 (concluding that the Plan is likely to stifle normal stockholder communications); Mills Rebuttal Report ¶¶ 48–51 (concluding that the "guardrails" in the AIC Provision place investors at the mercy of the Board's broad discretion, noting that Board discretion and after-the-fact litigious remedies don't "address or mitigate the current chilling effect of the Wolfpack Provisions on stockholder activism and the free exercise of the stockholder franchise").

[403] JX-73 at 3.

[404] *See* JX-69 at 22.

[405] *Mercier*, 929 A.2d at 807 (citing *Unocal*, 493 A.2d at 955); *eBay*, 16 A.3d at 35 (holding that where a rights plan "falls outside the range of reasonableness" the defendants fail "to meet their burden of proof under the second prong of *Unocal*"); *accord Air Prods.*, 16 A.3d at 92, 113 (holding that "the target board must show . . . that any board action . . . is 'reasonable in relation to the threat posed" and that the "Defendants bear the burden of showing that their defenses . . . fall within a 'range of reasonableness.'" (quoting *Unitrin*,

reasonable relationship to their stated corporate objective. Because Defendants failed to prove that the Plan falls within the range of reasonable responses, the Plan is invalid.

III. CONCLUSION

For the foregoing reasons, judgment is entered in favor of the certified class declaring the Plan unenforceable and permanently enjoining the continued operation of the Plan. Having concluded that the Plan is unenforceable because the Director Defendants breached their fiduciary duties under *Unocal* when adopting it, this decision need not resolve whether the Director Defendants independently breached their fiduciary duties by failing to redeem the Plan.

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651 A.2d at 1388)); *Yucaipa*, 1 A.3d at 331 ("[T]he board bears the burden to show that the pill is reasonable").

LAZARD'S CAPITAL MARKETS ADVISORY GROUP

Q1 2021 Review of Shareholder Activism

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Observations on the Global Activism Environment in Q1 2021

1 Global Activity Stable, Bolstered by U.S. Surge

- Q1 2021 saw a second consecutive quarter of elevated global activity (53 new campaigns initiated, in-line with Q1 2020 levels) following the pandemic-related downturn of mid-2020
- The significant U.S. rebound continues, with 37 new campaigns (up 48% from Q1 2020 levels) accounting for 70% of all global activity
  - Q1 2021 U.S. activity is already approaching ~50% of U.S. activity for all of 2020
  - In contrast to late 2020's emphasis on mega-cap activity in the U.S., three-quarters of all Q1 2021 activity targeted sub-$10bn market cap companies, including Treehouse Foods (JANA), Kohl's (Ancora, Legion et al.) and eHealth (Starboard and Sachem Head)
  - Prominent activists Icahn, JANA and Starboard were among the quarter's most prolific activists (launching 2 campaigns each), while perennially active Elliott launched only 1 new campaign (versus its average of ~4 campaigns launched per quarter since 2017)
- Following a record-setting Q4 2020, activity in Europe pulled back slightly, with only 10 new campaigns initiated
  - Institutional investors, occasional activists and new / small-cap activists dominated the new activity, leading 9 of 10 new campaigns

2 Board Seat Wins in Line with Prior Years, Proxy Season Looms

- 42 Board seats were won by activists in Q1 2021 (in line with Q1 2020), and Board change was an objective in ~42% of all new campaigns initiated
  - All Board seats in Q1 2021 were secured through negotiated settlements, with high-profile examples including Starboard / Corteva (3 seats), FirstEnergy / Icahn (2 seats), Public Storage / Elliott (2 seats) and IFF / Sachem Head (1 seat)
  - Board seats filled by activist employees (versus directors unaffiliated with the activist) reached a multi-year high (~38% of all Board seats won)
- Even with many of Q1 2021's live situations having recently settled, 66 Board seats remain "in play" heading into proxy season
  - Engine No. 1's contest for 4 seats at Exxon-Mobil (reportedly costing both parties in aggregate over $65mm) is scheduled to go to a vote on May 26
    - The Company's appointments of Inclusive Capital's Jeff Ubben and former Comcast CFO Michael Angelakis have not deterred the activist thus far
  - Other "in play" situations include eHealth / Starboard, Delek / Icahn, Monmouth REIT / Land & Buildings and Kohl's / Ancora, Legion et al.

3 M&A Persists as Primary Campaign Thesis

- 47% of all activist campaigns in Q1 2021 have had an M&A thesis
  - Attempts to scuttle or sweeten existing deals represented over half of all M&A-driven campaigns, versus 34% historically
    - Prominent examples of scuttle / sweeten campaigns in Q1 2021 include CoreLogic (Pentwater) and TC Pipelines (Energy Income Partners)
  - By contrast, campaigns pushing for an outright sale of the company represented only 12% of M&A campaigns in Q1 2021, a five-year low

4 ESG Momentum Continues Unabated

- U.S. ESG equity inflows have continued their torrid 2020 pace to start 2021, with ~$17bn through February, setting 2021 on a path to far surpass 2020's record inflows of ~$62bn
- The SEC's action to explore mandatory climate change-related disclosures highlights the rapidly developing regulatory environment for ESG issues
- "Say-on-Climate" proposals from TCI Fund Management highlight diversifying activist tactics regarding ESG matters, especially in a proxy season where institutional investor votes on E&S proposals will be closely scrutinized

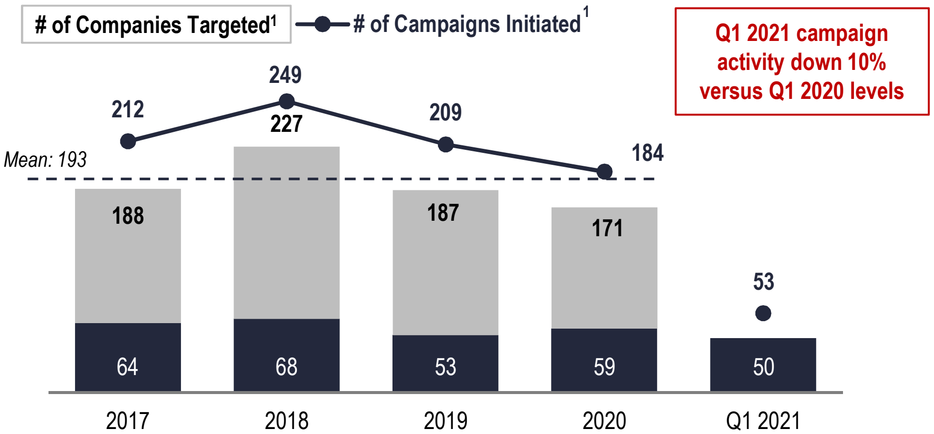
5 SPAC Surge Continues, with De-SPACs Attracting Short Activists

- After a record breaking 2020, SPAC activity in 2021 has continued its strong momentum, with 298 SPACs raising $97bn in Q1 2021, already exceeding total 2020 levels
  - 433 SPACs representing $140bn of dry powder are currently searching for targets, the highest levels on record
- Short activism targeting de-SPACs shortly after completion of their merger transactions is on the rise
  - Of the 8 such short campaigns since the beginning of 2020, 4 occurred in Q1 2021 alone

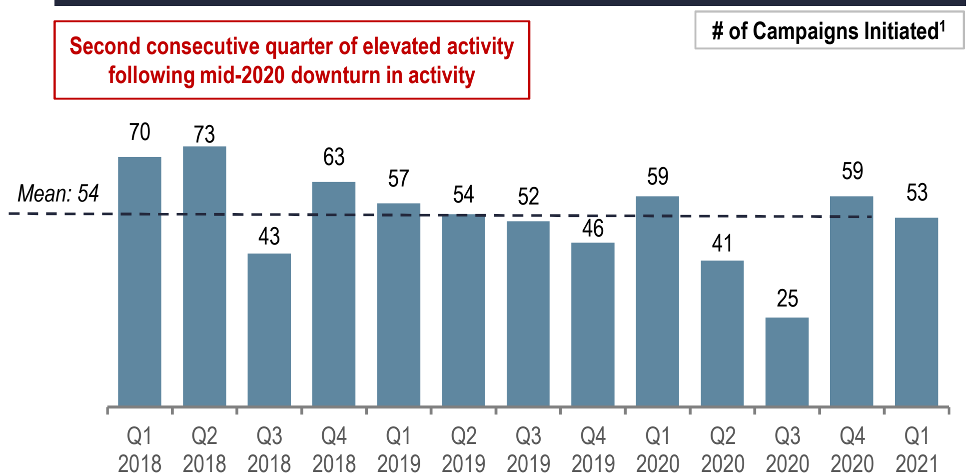
Global Campaign Activity and Capital Deployed

($ in billions)

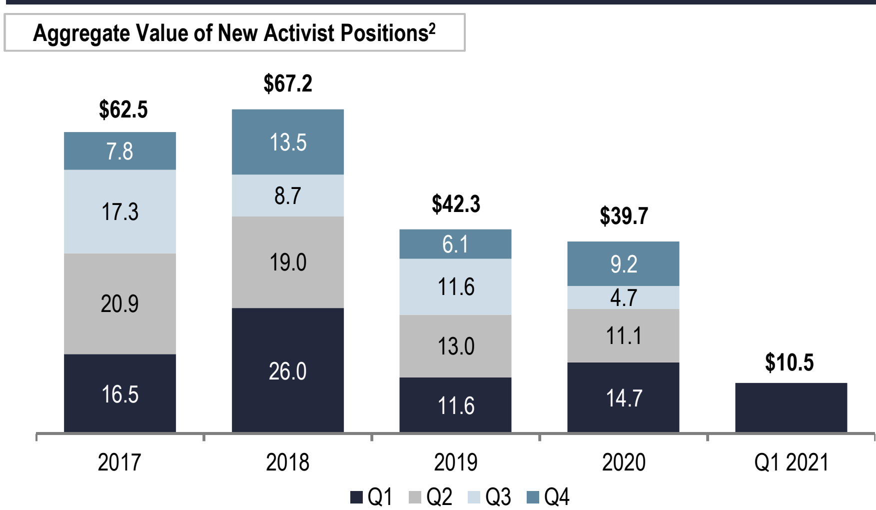
Annual Campaign Activity[1]



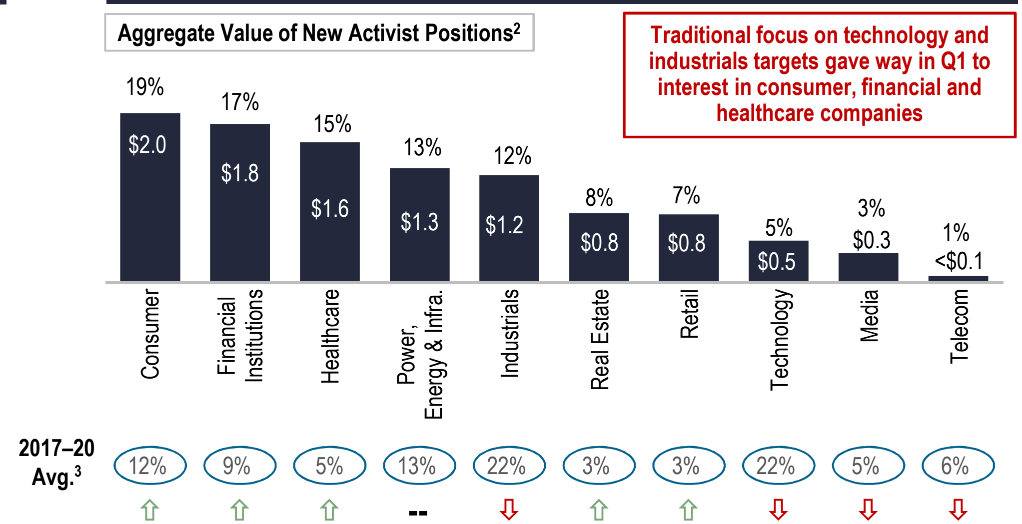
Quarterly Campaign Activity



Capital Deployment in New Campaigns ($bn)



Q1 2021 Capital Deployed by Sector

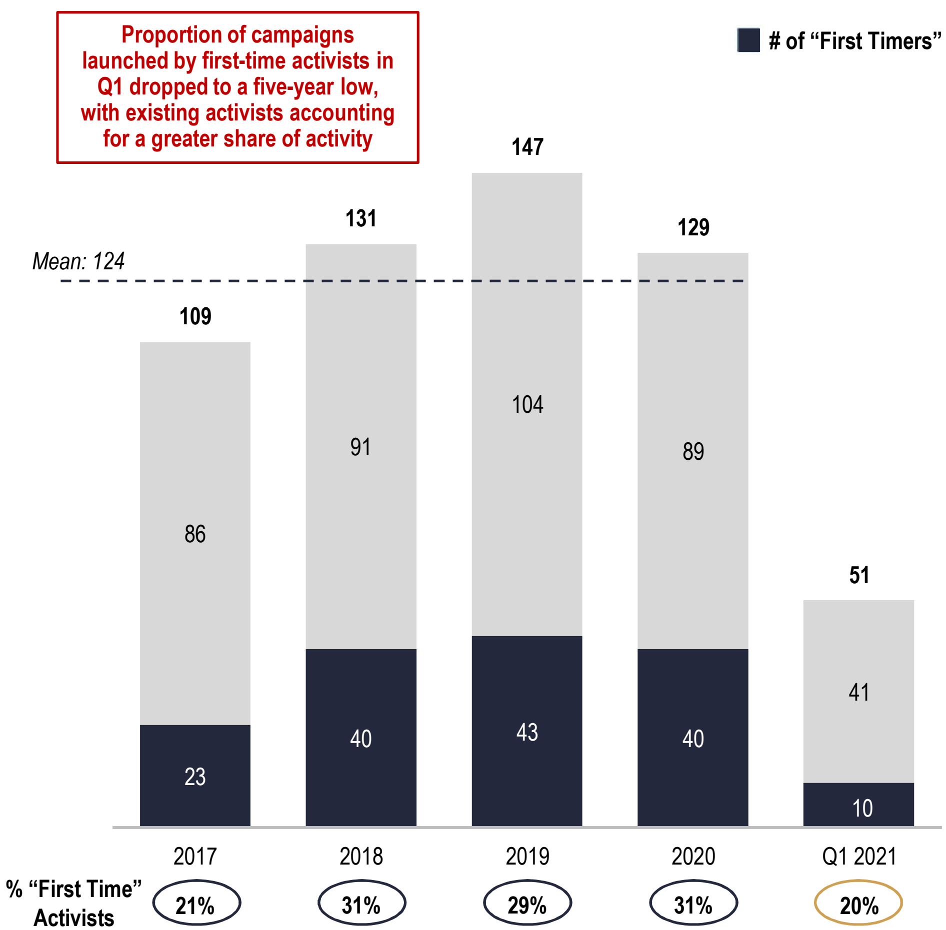


Source: *FactSet, press reports and public filings as of 3/31/2021.*
Note:

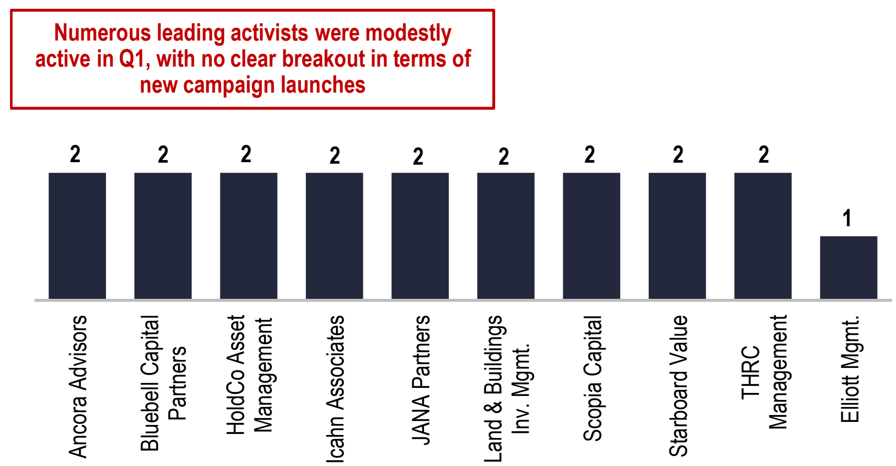
Global Activist Activity in Q1 2021

Leading activists such as Icahn, JANA and Starboard each launched multiple campaigns during Q1 2021; Elliott was active with its existing targets but launched only 1 new campaign (relative to a historical average of ~4 campaigns per quarter)

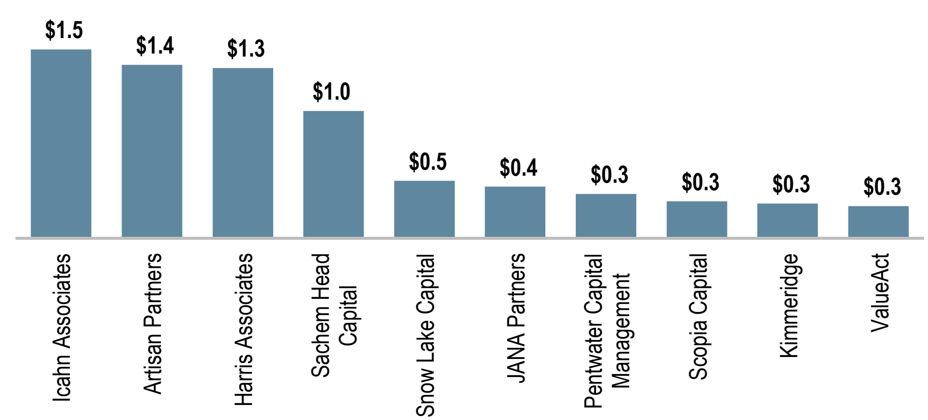
Investors Launching Activist Campaigns



Q1 2021 Activist Activity by Campaigns Launched



Q1 2021 Capital Deployed ($bn)



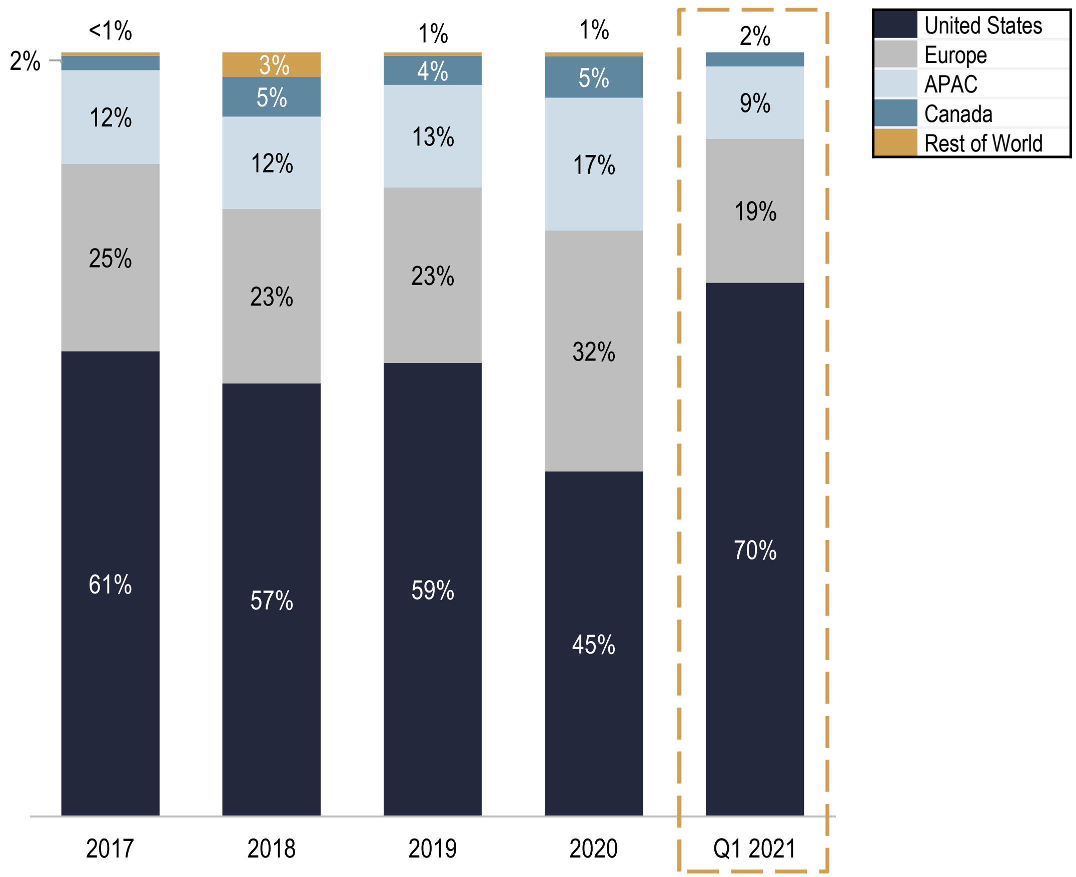
Source: *FactSet, press reports and public filings as of 3/31/2021.*
Note:

Regional Breakdown of Global Activity Highlights U.S. Rebound

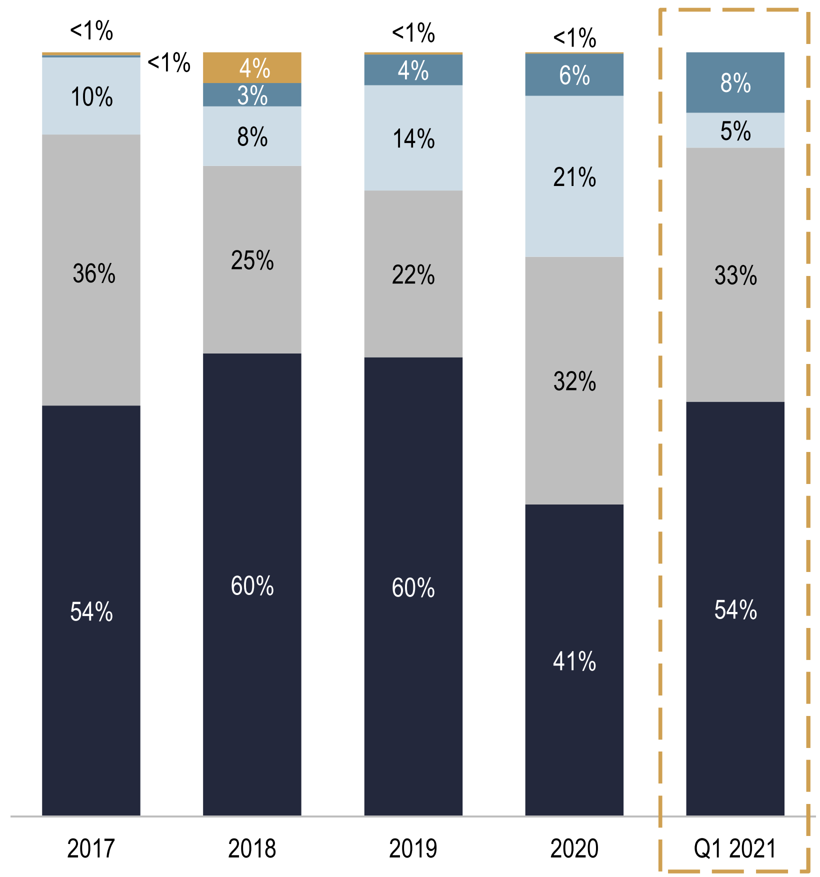
($ in billions)

U.S. activity surged in Q1 2021, representing 70% of the number of global campaigns, a five-year high; capital deployed in the U.S. also increased, representing 54% of capital deployed, an increase from 2020 and a return to multi-year averages

Regional Breakdown of Campaigns Initiated by Year



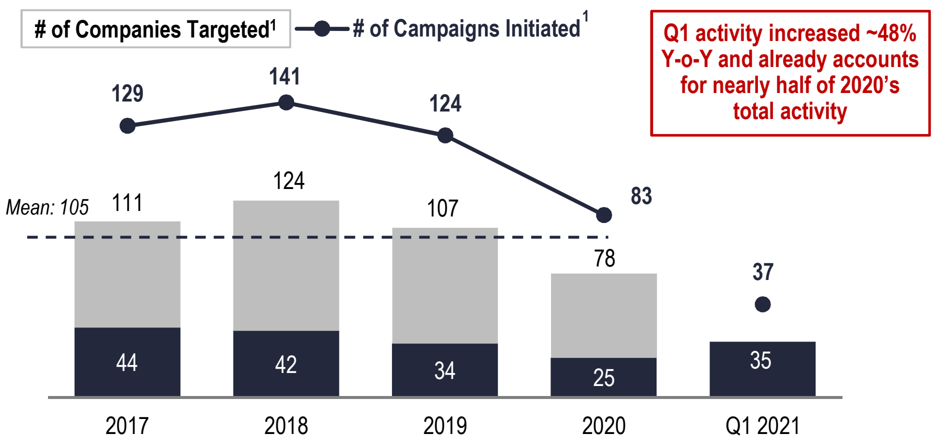
Regional Breakdown of Capital Deployed by Year



U.S.: Campaign Activity and Capital Deployed

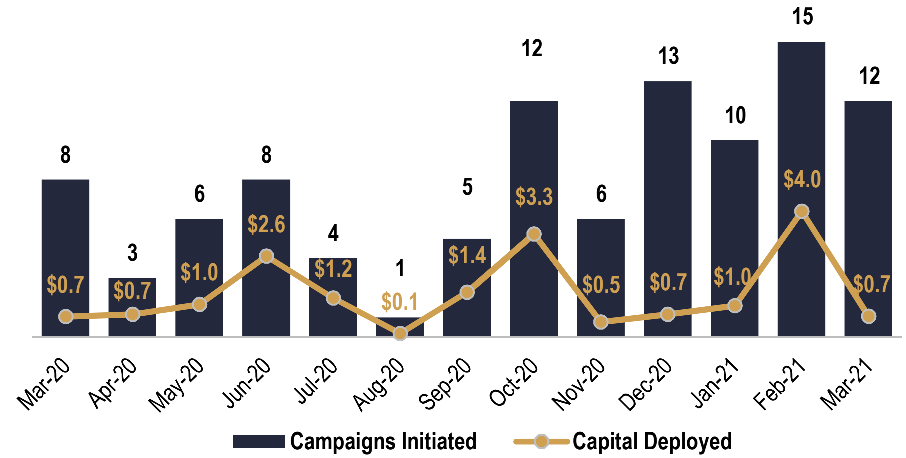
($ in billions)

U.S. Annual Campaign Activity[1]

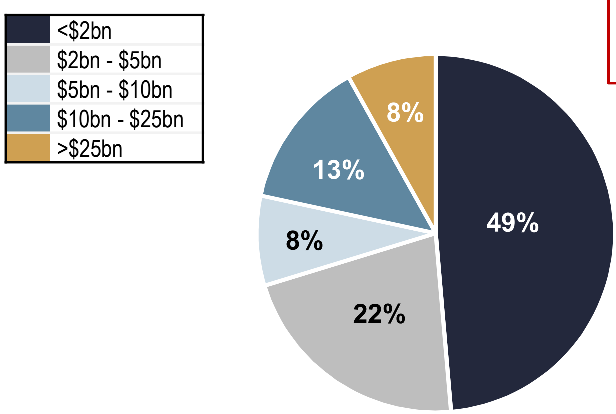


Q1 activity increased ~48% Y-o-Y and already accounts for nearly half of 2020's total activity

U.S. Campaign Activity by Month (LTM)



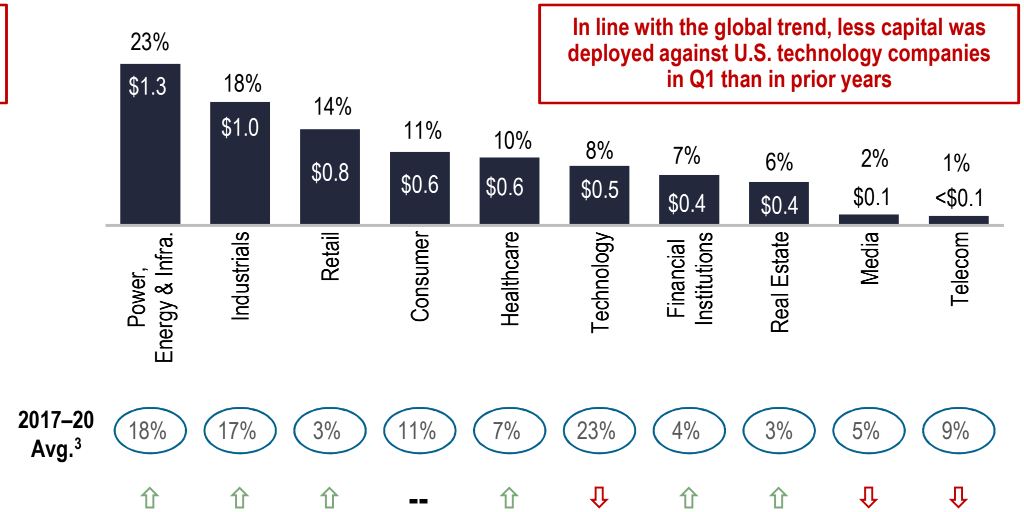
U.S. Market Cap. Breakdown of New Campaigns, Q1 2021[2]



Campaigns against >$25bn companies are down from the 20% level of Q4 2020

Q1 2021 U.S. Capital Deployed by Sector[2]

In line with the global trend, less capital was deployed against U.S. technology companies in Q1 than in prior years



U.S.: Notable Q1 2021 Public Campaign Launches and Developments

($ in billions)

Launch Date	Company / Market Cap	Activist	Highlights
2/21	labcorp $24.1	JANA PARTNERS LLC	• In February, JANA disclosed a 0.8% stake and media reports suggested that JANA may be pushing for the Company to spin off its Covance clinical research business • Later that month, the media reported that JANA had nominated an undisclosed number of Directors to the Board • In March, the Company launched a strategic review and JANA withdrew its nominations
2/21	KOHL'S $8.3	ANCORA LEGION PARTNERS Macellum CAPITAL MANAGEMENT 4010	• In February, the activist group filed a joint 13-D revealing a 9.5% stake • The activists nominated nine Directors and urged the Company to reduce its inventory and do a sale-leaseback of non-core assets • In March, the group reduced its slate from nine to five Directors and criticized the Company's pay practices • In April, the group issued a public letter further criticizing the Company's forward strategy
2/21	Principal $15.0	ELLIOTT	• In February, Principal announced a settlement agreement with Elliott wherein Principal appointed a new Director and agreed to cooperate with Elliott to appoint an additional Director by September • In addition, Principal announced that it would launch a strategic review of its business mix, capital management and capital deployment options
2/21	FirstEnergy $18.6	ICAHN ENTERPRISES L.P.	• In February, FirstEnergy announced that it had received a letter from Icahn stating that he intended to purchase a stake in the Company of between ~$184mm and ~$920mm in value • In March, a settlement was reached and two Icahn representatives – Jesse Lynn and Andrew Teno – joined the Board

Launch Date	Company / Market Cap	Activist	Highlights
2/21	TreeHouse $2.8	JANA PARTNERS LLC	• In March, JANA disclosed a 7.5% stake and its intent to nominate three Directors to the Board • JANA reported that it had engaged in discussions with the Board regarding capital allocation, operations, governance and a potential sale • In March, a settlement was reached and two independent Directors – including John Gainor, one of JANA's initial nominees – joined the Board
2/21	iff $33.7	SACHEM HEAD	• In February, the media reported that Sachem Head built a $1bn stake in the Company and nominated four Directors to the Board • In March, an agreement was reached under which Sachem Head will have the option to have its founder Scott Ferguson appointed to the Board later this year
12/20	ExxonMobil $172.9[1]	ENGINE NO.1 CALSTRS DEShaw&Co	• In January, Engine No. 1 formally nominated four Directors to the Board less than two months after writing a letter to the Board criticizing performance and gaining the support of CalSTRS • In March, Inclusive Capital Partners' Jeff Ubben was appointed to the Board along with former Comcast executive Michael Angelakis • Later that month, it was revealed that the total costs associated with the ongoing proxy fight were expected to be more than $65mm
10/20	CORTEVA agriscience $24.2	STARBOARD VALUE	• In January, Starboard nominated eight Directors to the Board, citing poor operational performance and the need to replace CEO Jim Collins • In February, CFO Gregory Friedman announced that he would step down, but would continue to serve in the role until a successor was named • In March, a settlement was reached and three Starboard nominees were appointed to the Board

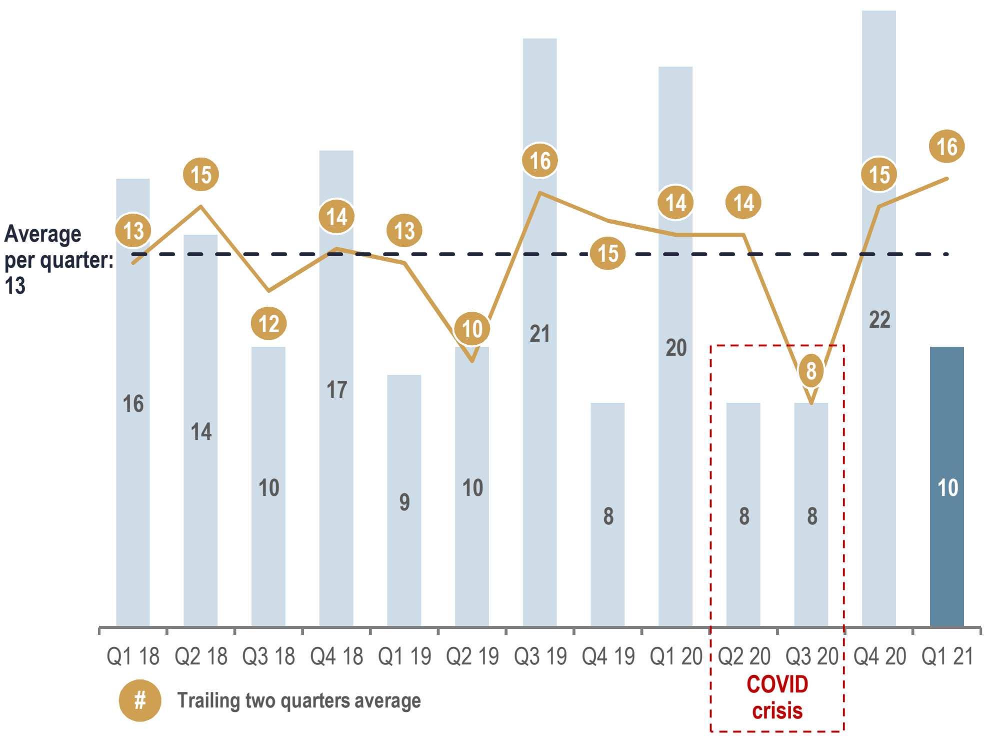
Non-U.S.: Notable Q1 2021 Public Campaign Launches and Developments

($ in billions)

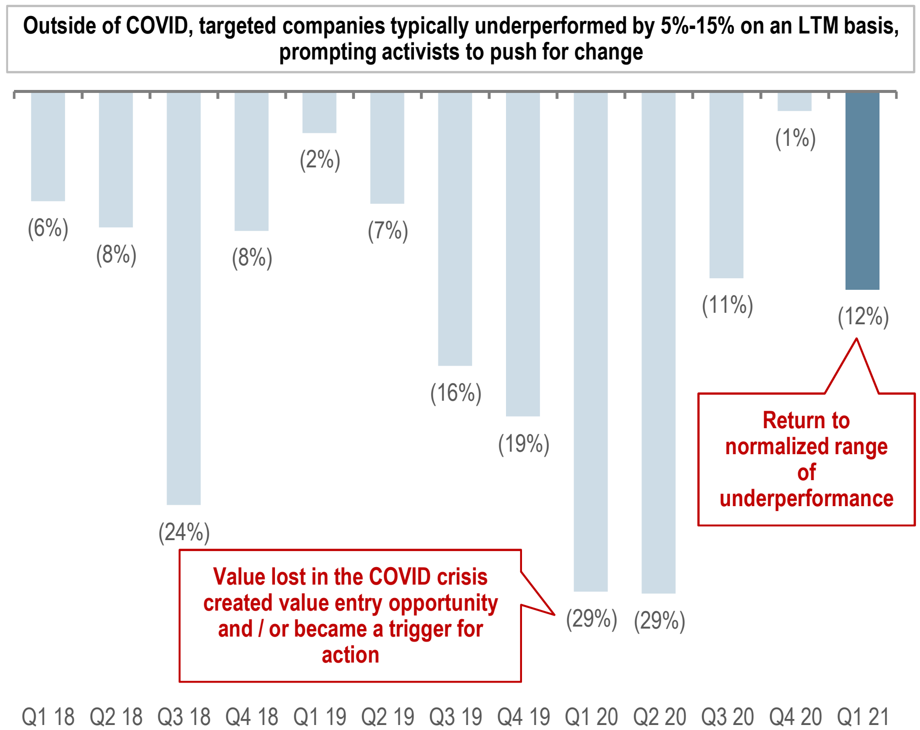
Launch Date	Company / Market Cap	Activist	Highlights
3/21	Creval $1.0	Petrus Advisers; Alta Global	• In February, Petrus stated that the Company should remain independent or pursue the Crédit Agricole transaction only if the offer was raised to €15-21 / share or higher • In March, Alta Global urged Crédit Agricole to increase its offer, as it believed that the bid of €10.50 / share did not represent the fair value
3/21	UniCredit $23.8	Bluebell Capital Partners	• In March, BlueBell sent a letter voicing concerns over the appointment of Pier Padoan as Chairman designate, arguing that the former politician's ties to Italy's Democratic Party could create conflicts of interest, and also questioning the potential acquisition of Monte dei Paschi for similar reasons
2/21	Bausch Health $10.7	Icahn Enterprises L.P.; Glenview Capital Management	• In February, Icahn revealed that he intended to engage in discussions with the Company about its ongoing strategic review and Board representation • One day later, Glenview urged the Company to undertake a breakup • Later that month, a settlement was reached and Icahn was awarded two Board seats, including one to Brett Icahn
2/21 & 1/21	Danone $45.4[1]	Artisan Partners; Bluebell Capital Partners	• In January, Bluebell demanded the separation of the Chairman and CEO roles and for the Company look for a new CEO given structural underperformance • In February, Artisan called on Danone to take steps to improve performance and later urged it to shakeup its portfolio of brands, separate the Chairman and CEO roles and replace its CEO • In March, the Chairman and CEO resigned from both roles
1/21	Moneta Money Bank $1.8	Petrus Advisers	• In January, Petrus Advisers issued a presentation and sent a public letter to the Board stating that the proposed merger with PPF Group lacked transparency, and urged shareholders to vote against the proposed acquisition and against the potential acquisition of Air Bank
1/21	Tabcorp $7.1	Sandon Capital	• In January, Sandon Capital sent a letter urging the Company to examine spinning off its lottery business from its wagering arm • In March, the Company rejected offers for its wagering and media business and instead launched a strategic review for the unit
1/21	MGM China Holdings Limited 美高梅中國控股有限公司 $6.0	Snow Lake Capital	• In January, Snow Lake Capital called on the Company to sell a fifth of its China business to a strategic partner, arguing this transaction would "deliver significant shareholder value" to both companies
11/20	Sampo Group $24.5[1]	Elliott	• In February, Elliott publicly called on Sampo to distribute half of its 15.9% stake in Nordea to shareholders and sell the remainder for cash by the end of the year • Later that month, Sampo announced that it would materially reduce its holding in Nordea over the next 18 months

Europe: Activity in Q1 2021 Slower After Record Q4 2020

Quarterly Campaigns Initiated in Europe



Median LTM TSR of Targeted Companies[1] vs. EuroStoxx 600

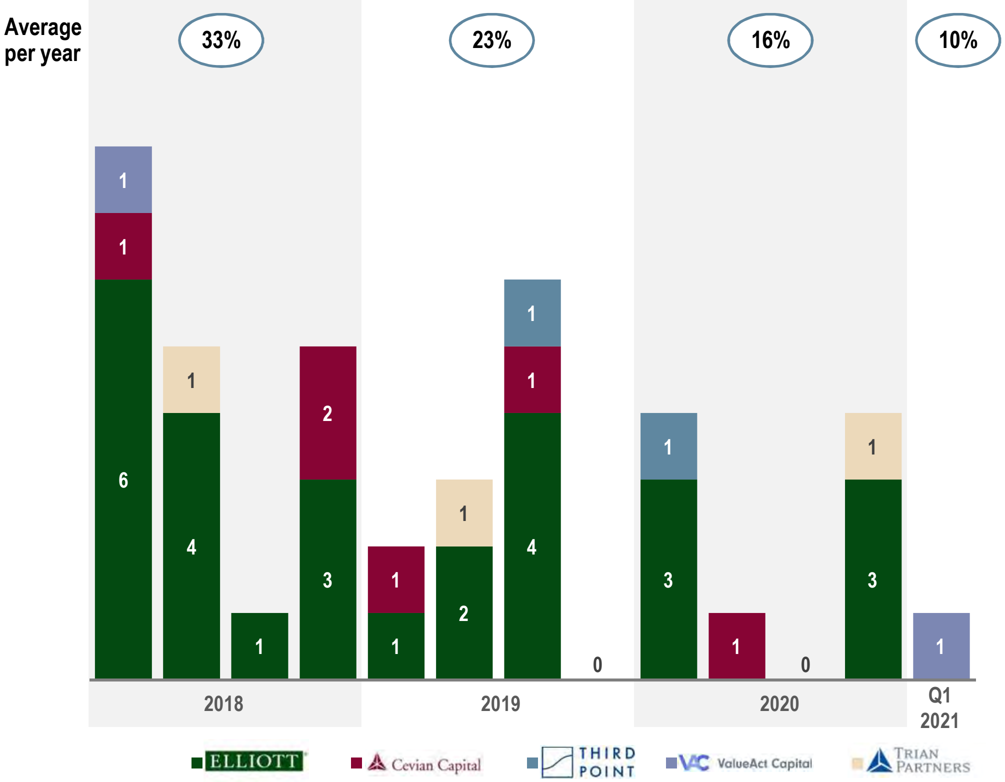


- **New European campaign activity in Q1 2021 experienced a significant slowdown compared to Q4 2020**
- **However, based on a trailing six-month rolling average, European activist activity is above the average level**
  - The decrease in activity in Q1 2021 reflects a recurring trend of fewer campaigns following quarters with strong activity such as the all-time high in Q4 2020

- **Activists have historically targeted under-performing, but not "broken," companies**
- **Market destabilization catalyzed campaigns at the most punished companies during the height of the COVID-19 pandemic**
- **In Q1 2021, target performance normalized to pre-pandemic levels with those companies that lagged peers finding themselves in the crosshairs of shareholders unhappy with the status quo**

Europe: Size of Activist Funds No Longer a Restriction on Target Selection

Leading Large-Cap[1] Activists[2] Remain on Sidelines (# of Campaigns)



- Over the past few years, the prevalence of activist campaigns by Tier 1 large-cap funds[2] shrunk as a proportion of total campaigns
- In 2018, Tier 1 large-cap activists accounted for ~33% of campaigns versus ~16% in 2020 and 10% in Q1 2021, as an emerging group of new and smaller agitators filled the void

Large Cap Companies are Now Targeted by Smaller Funds[3]

2018 - 2020

42% of campaigns targeting large-cap companies were led by Tier 1 activists

CRH	SAP	PRUDENTIAL
Market Cap.: $25bn	Market Cap.: $158bn	Market Cap.: $48bn
Cevian Capital	ELLIOTT	THIRD POINT
AUM: ~$15bn	AUM: ~$35bn	AUM: ~$15bn

Q1 2021

Bluebell, a fund with less than $100m in AUM, led two campaigns against large cap companies

DANONE	UniCredit
Market Cap.: $45bn	Market Cap.: $24bn
BLUEBELL	BLUEBELL
AUM: <$0.1bn	AUM: <$0.1bn

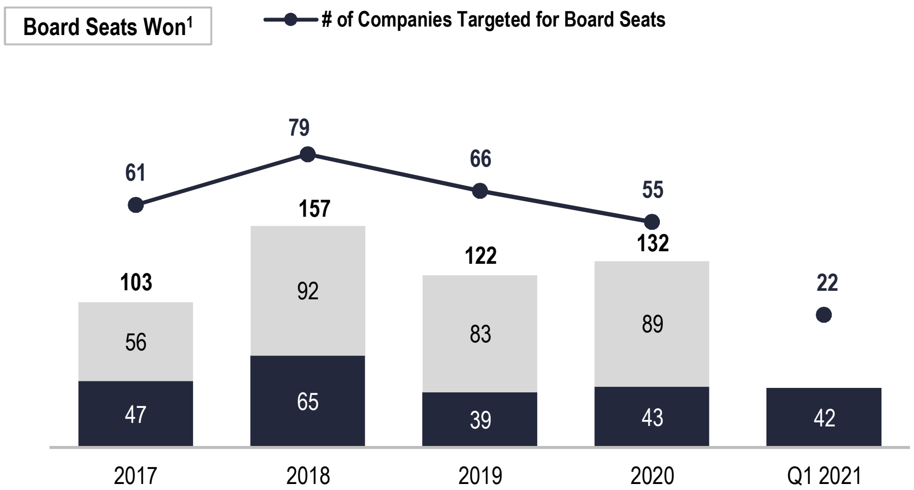
- Historically, Tier 1 large-cap funds[2] launched almost half of the campaigns against the largest European companies
- However, smaller activist funds increasingly leverage sophisticated strategies to gain broad shareholder support and successfully target large-cap companies
  - Recently, investors with limited AUM launched campaigns against companies with market capitalizations above $20bn and successfully prompted material changes

Source: *FactSet, press reports and public filings as of 3/31/2021.*
Note:

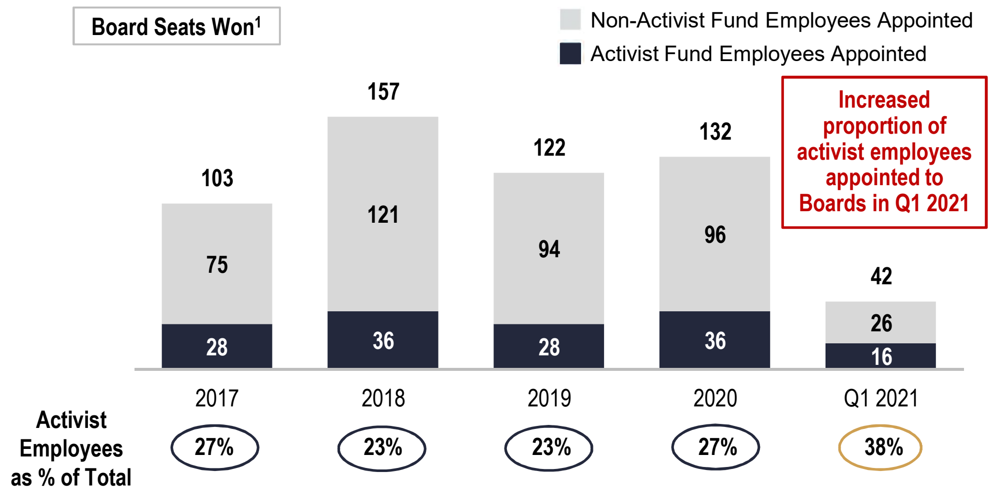
Global Board Seats Won

The 42 Board seats won in Q1 2021 are in-line with prior year levels; Starboard and Ancora were the most successful in securing Board seats

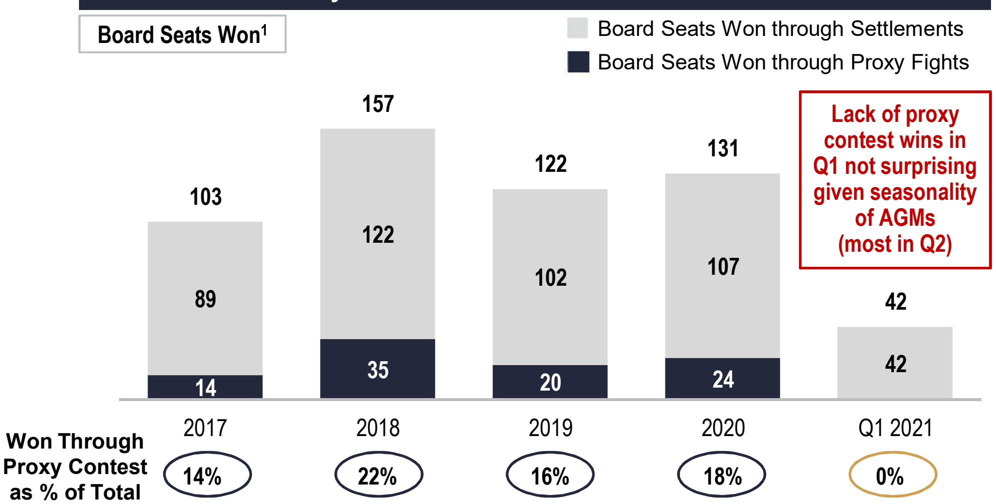
Board Seats Won[1]



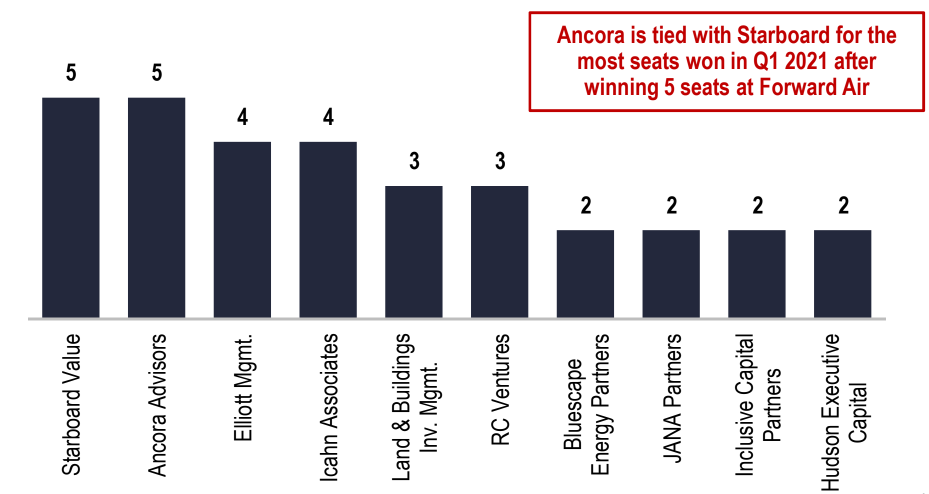
Non-Activist Employees vs. Activist Employees Appointed as Directors



Settlements vs. Proxy Contests



Q1 2021 Board Seats Won by Activists



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Source: FactSet, press reports and public filings as of 3/31/2021.
Note:

Board Seats "In Play": Calendar of Upcoming Contested AGMs

Even with many of Q1 2021's live campaigns having recently settled, there are 66 Board seats "in play" at 18 companies in the coming months

April

April 21 (Blucora)
Ancora Advisors
Slate Size: 4

April 27 (Boston Private)
HoldCo Asset Management
Slate Size: 3

April 28 (CoreLogic)
Pentwater Capital Management
Slate Size: 1

May

May 6 (Delek US)
Icahn
Slate Size: 3

May 12* (Columbia Property Trust)
Arkhouse,
The Sapir Organization,
8F Investment Partners
Slate Size: 6

May 13 (Kohl's)
Ancora / Legion Partners / Macellum / 4010 Capital
Slate Size: 5

May 14* (MREIC)
Land & Buildings
Slate Size: 4

Blackwells Capital
Slate Size: 4

May 26 (ExxonMobil)
Engine No. 1
Slate Size: 4

June

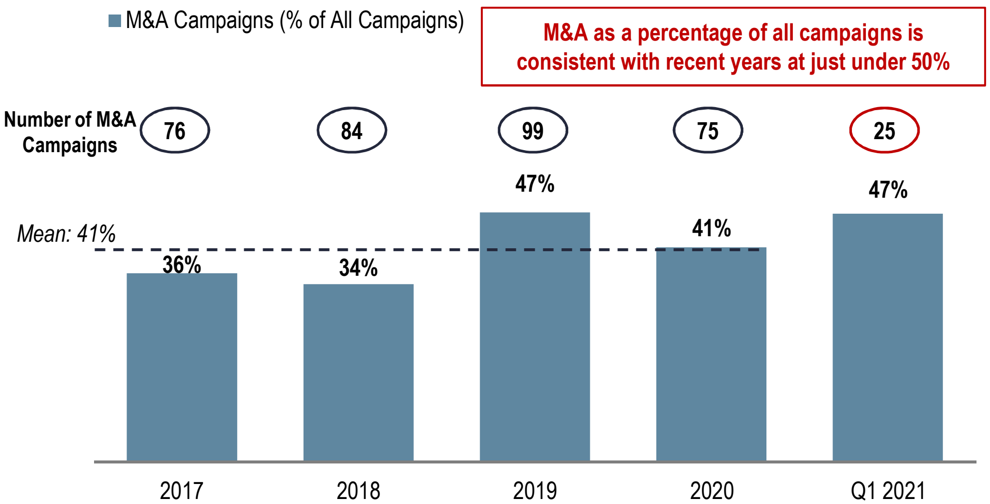
June 9* (eHealth)
Starboard Value
Slate Size: 4

June 23* (Adverum Biotechnologies)
The Sonic Fund II
Slate Size: 5

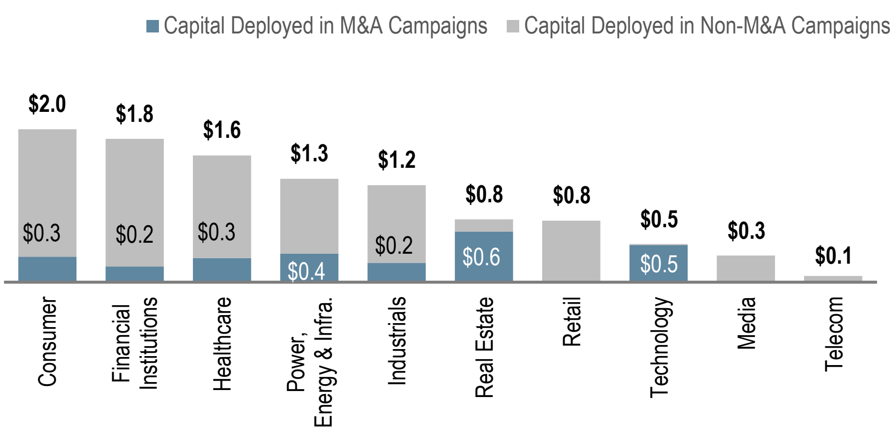
Sustained Prominence of M&A-Related Campaigns

While the prevalence of M&A as a campaign objective in Q1 2021 was consistent with prior year levels, the mix of M&A-related activism has shifted towards opposing transactions

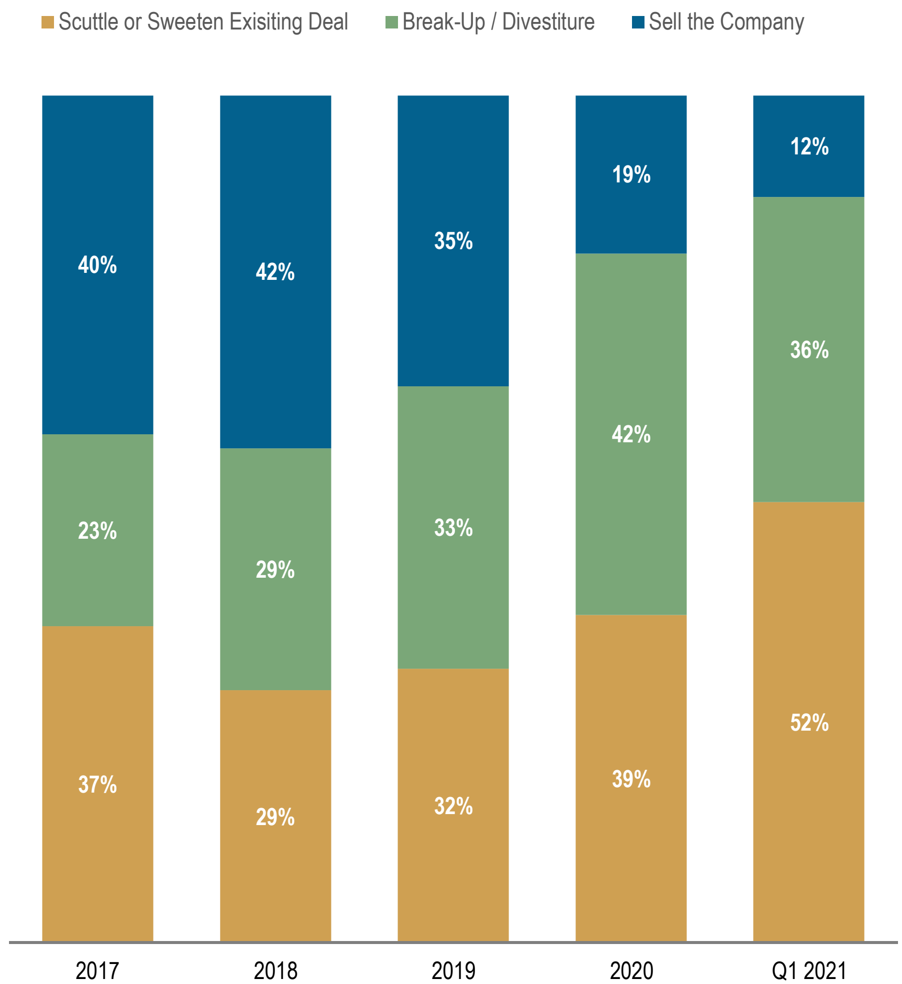
M&A Campaigns



Q1 2021 Capital Deployed in M&A Campaigns by Sector



M&A Campaign Objectives by Type



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Source: FactSet, press reports and public filings as of 3/31/2021.

The Activist Role in M&A in Q1 2021

Sell the Company

Agitate for sale of target or encourage industry consolidation

12%

	Target / Activist	M&A Thesis
3/21	Columbia Property Trust / Arkhouse Partners / The Sapir Organization / 8F	After nominating six Directors to the Board, the activist group advanced a takeover offer to buy out Columbia for $19.50 per share
2/21	Berkshire Hills Bancorp / HoldCo Asset Management	HoldCo sent a letter to the Board urging the Company to pursue a sale and expressing frustration with recent senior-level departures; a settlement was later reached and the activist was granted two Board seats
2/21	TreeHouse / JANA Partners LLC	JANA reported that it had engaged in discussions with the Board regarding capital allocation, operations, governance and a potential sale; a settlement was later reached and the activist was granted two Board seats

Break-Up / Divestiture

Agitation for a divestiture of a non-core business line or company breakup

36%

	Target / Activist	M&A Thesis
2/21	labcorp / JANA Partners LLC	JANA disclosed a stake and the media suggested that JANA was pushing for the spin off of the Covance clinical research business; after reportedly nominating Directors, the Company launched a review and JANA withdrew its nominations
2/21	Blucora / Ancora Advisors	Ancora nominated four Directors to the Board and argued that the Company should rethink its strategy and sell its TaxAct tax business
1/21	MiMedx / Prescience Point Capital Management	Prescience Point stated that the Company's AmnioFix is an asset worth billions, criticized the Company for ineffectively communicating its value and engaged in discussions regarding a potential sale of this asset

Scuttle or Sweeten Existing Deals

Entry into a live M&A situation to improve deal terms or block an ill-perceived deal from proceeding

52%

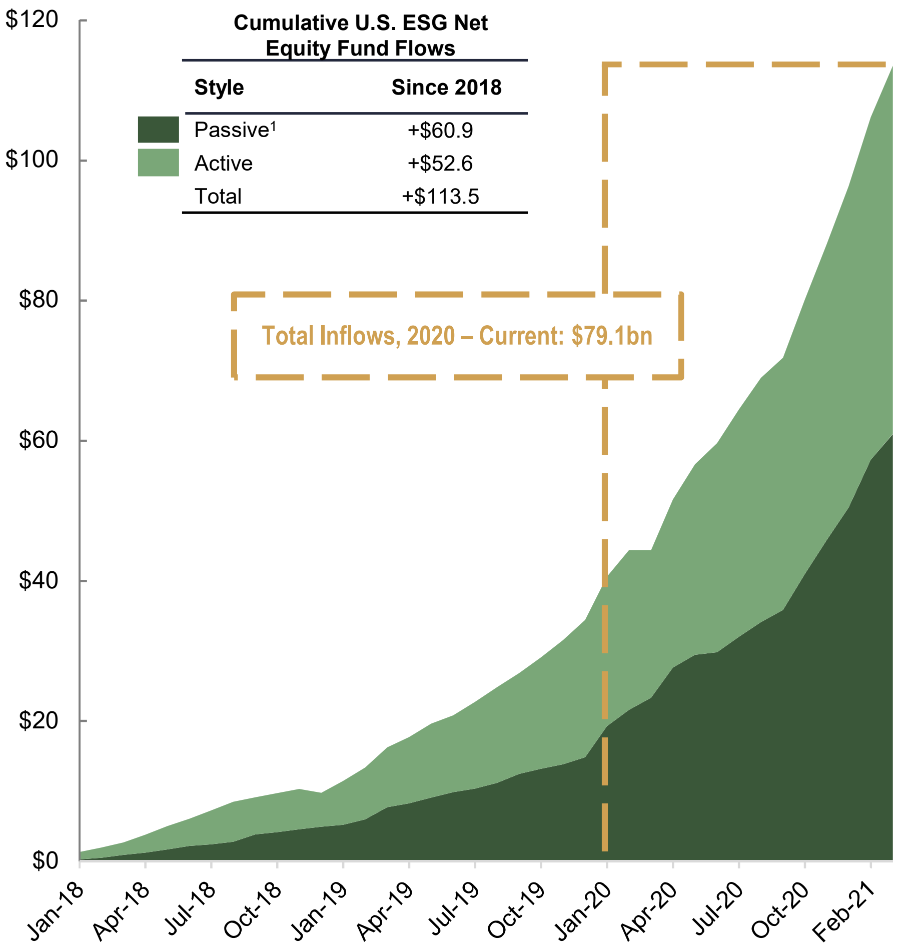
	Target / Activist	M&A Thesis
2/21	CoreLogic / Pentwater Capital Management LP	Pentwater nominated its CEO to the Board, a move that the media reported was tied to the Company's sale process whereby the Company agreed to sell itself to two private equity firms (Stone Point Capital and Insight Partners)
1/21	GS Shop / Petra Capital Management	Petra Capital Management publicly disapproved of the Company's plans to merge GS Retail with GS Shop, saying that the proposed merger ratio undervalued the Company and unfairly benefitted the Company's founding family
1/21	Pluralsight / Eminence Capital	Eminence Capital opposed Vista Equity's acquisition offer for Pluralsight, saying the $20.26 per share price was "artificially low" and accused the Company of running a manipulated sales process designed to benefit management and Vista

Source: *FactSet, press reports and public filings as of 3/31/2021.*
Note: All data is for campaigns conducted globally at companies with market capitalizations greater than $500 million at time of campaign announcement.

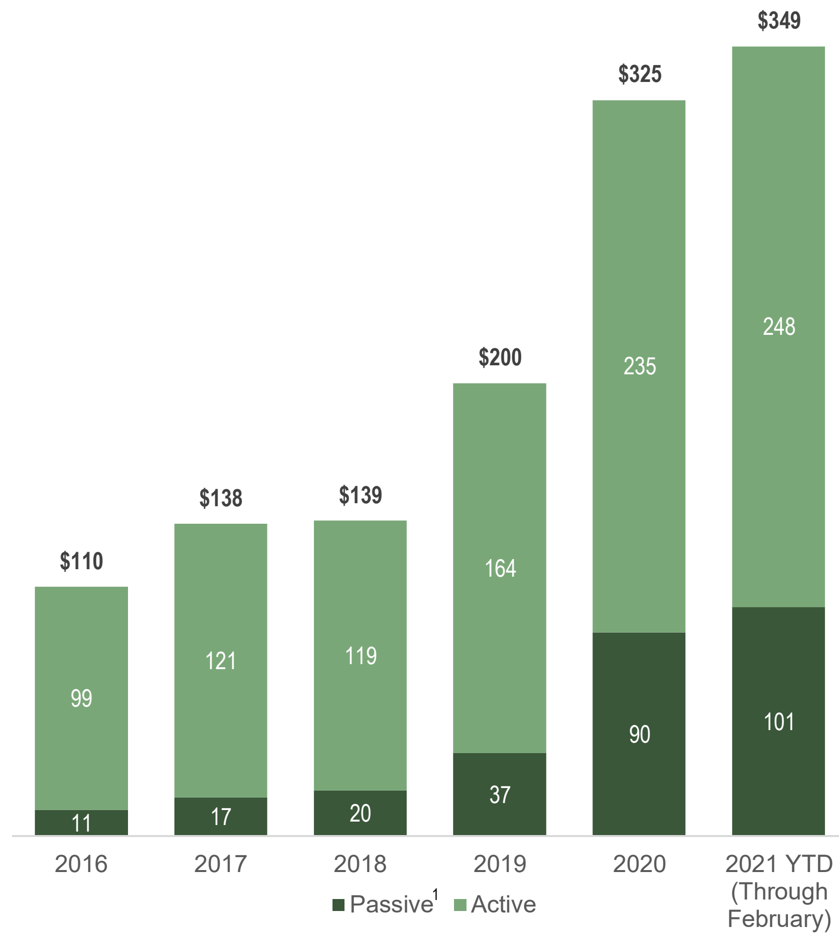
Increasing ESG Equity Inflows in the U.S.

While still a small portion of overall U.S. equity assets, inflows into ESG-related funds have dramatically accelerated

U.S. ESG Mandate Net Equity Fund Flows ($bn), 2018 – February 2021



U.S. ESG Mandate Equity Fund AUM ($bn), 2016 – February 2021



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Source: *SimFund, press reports and public filings.*
Note: U.S. "ESG Mandate" funds comprise those with explicit ESG investment criteria.
1 Includes both ETFs and index mutual funds.

ESG Regulatory Developments in the U.S.

ESG considerations have increasingly been taken up across the U.S. government, with particularly swift action being taken at the SEC on a number of fronts

SEC	• Acting SEC Commissioner Allison Herren Lee has recently outlined several key ESG initiatives for the agency: – Evaluating mandatory climate-related disclosures, as well as disclosures on other ESG focus areas including diversity and political spending – A new enforcement task force charged with policing ESG-related misconduct and material misstatements across issuer disclosures – Revisiting shareholder proposal rules, including revising recently adopted changes and the process by which companies can exclude proposals from their proxies – Support for the IFRS-planned Sustainability Standards Board and exploration of a similar SEC-led body for the U.S. market
Federal Reserve	• The Fed has joined the Network for Greening the Financial System, a network of central banks and regulators focused on climate risk in the financial sector • Fed Governor Lael Brainard has emphasized the need to focus on climate change-related risks in her public remarks
Biden Administration	• The new administration has initially focused on its pandemic stimulus bill, though it has signaled its ESG priorities through a number of initial actions: – Rejoining the Paris Climate Accords – Pausing new oil and gas leases on federal land

"Climate risks and sustainability are critical issues for the investing public and our capital markets," *said Acting Chair Allison Herren Lee.* ***"The task force announced today will play an important role in enhancing and coordinating the efforts of the Division of Enforcement, the Office of the Whistleblower, and other parts of the agency to bolster the efforts of the Commission as a whole on these vital matters."***

SEC ESG TASK FORCE ANNOUNCEMENT, 4 MARCH 2021

"With climate-related risks on the rise, governments, regulators, corporations, and investors are mobilizing to accelerate the transition to a greener economy, including through ambitious targets for reducing greenhouse gas emissions. ***Unanticipated or abrupt shifts in policy, technology, or investor sentiment have the potential to produce abrupt repricing events that could result in losses on financial institution balance sheets. Over a longer horizon, such shifts could also have implications for their business strategies."***

LAEL BRAINARD, FEDERAL RESERVE GOVERNOR, SPEECH TO THE IIF CLIMATE FINANCE SUMMIT, 18 FEBRUARY 2021

*"****Increasingly, investors really want to see – tens of trillion of dollars in assets behind it – climate risk disclosure… Issuers would benefit from such guidance.*** *So, I think through good economic analysis, working with the staff, putting out to the public to get public feedback that is something the commission, if I'm confirmed, would work on."*

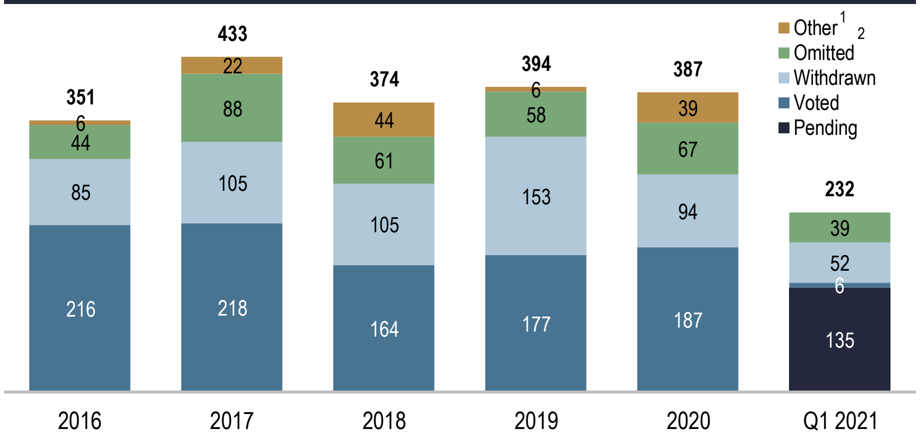
GARY GENSLER, REMARKS DURING CONFIRMATION HEARING, 2 MARCH 2021

Source: Press reports and public filings.

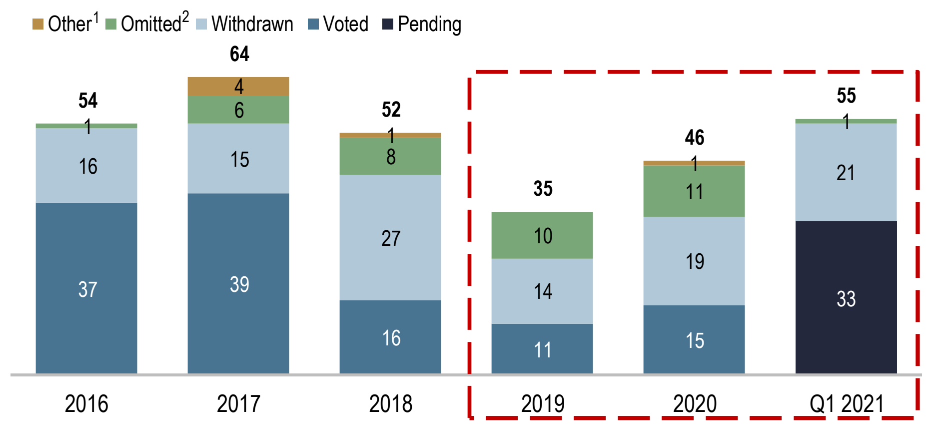
2021 Proxy Season to Shine a Light on Investor and Corporate ESG Commitments

All eyes are on how asset managers vote on E&S-related shareholder proposals this year, with intense pressure to back more proposals commensurate with the more prominent ESG rhetoric from key investors

Total U.S. E&S Proposals Submitted, 2016 – Q1 2021

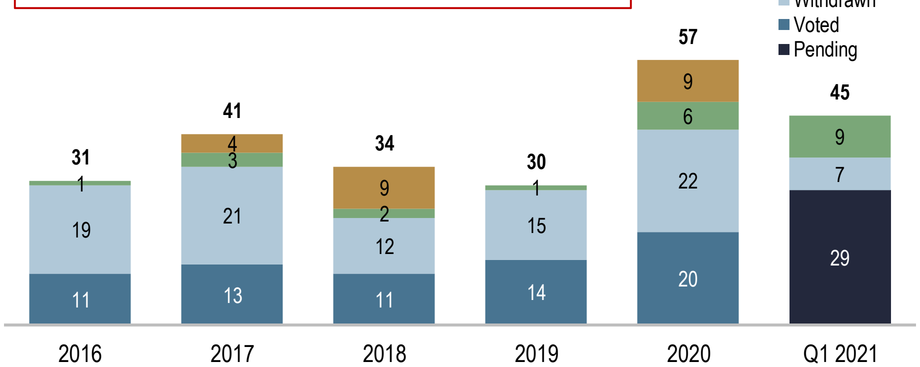


U.S. Climate-Related[3] Proposals Submitted, 2016 – Q1 2021



U.S. Diversity-Related Proposals[4] Submitted, 2016 – Q1 2021

Increased volume of diversity-related proposals over the past two years; four received majority support in 2020



Activist	U.S. Companies Targeted	"Say-on-Climate" Proposal Overview
TCI	Charter Communications; Union Pacific	• Publish a report consistent with TCFD on greenhouse gas emissions levels and the company's strategy to reduce its emissions • Disclose progress on emissions reductions year-over-year • Put plan to a non-binding advisory shareholder vote annually

The "Say-on-Climate" proposals from TCI Fund Management at Union Pacific and Charter Communication – and its pledge to bring such proposals to "hundreds of companies" over the next several years – demonstrate how activists are diversifying their tactics to place pressure on companies regarding ESG issues

Source: *ISS Governance, press reports, public filings.*
Note: Represents proposals submitted at S&P 500 companies for the 2021 proxy season.
1 Proposal not included in proxy statement or not presented at AGM for undisclosed reasons.
2 Proposal omitted following no-action process with the SEC.
3 Proposals that include language related to climate-related issues and disclosures, greenhouse gases and the Paris Agreement.
4 Proposals that include language related to racial / ethnic diversity and EEO disclosures.

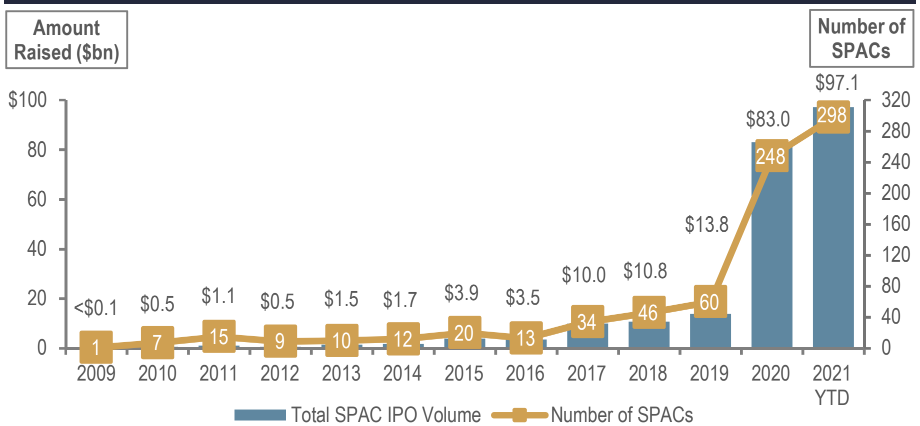
U.S. Listed SPAC Business Combination and Outstanding Volume

($ in billions, unless otherwise noted)

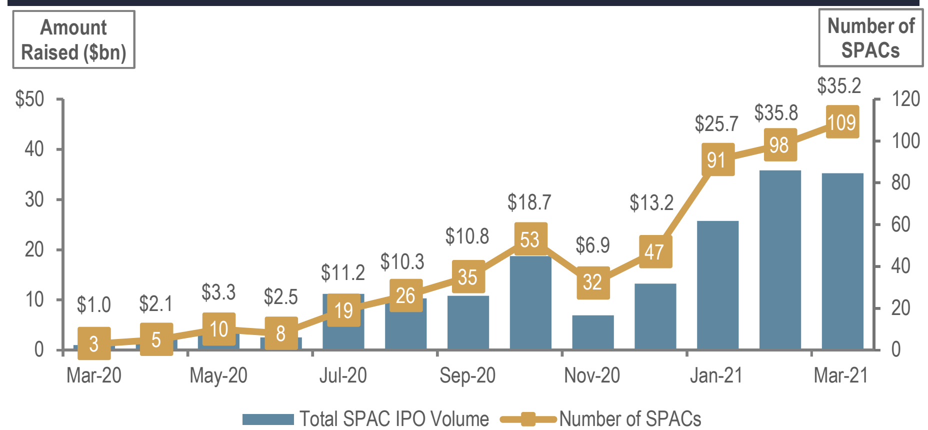
After a record-breaking 2020, SPAC activity in 2021 has gotten off to a red-hot start, with the first three months of the year seeing close to 300 SPACs raising ~$97bn, already exceeding total 2020 levels

- Currently, 433 SPACs representing ~$140bn in capital are searching for targets

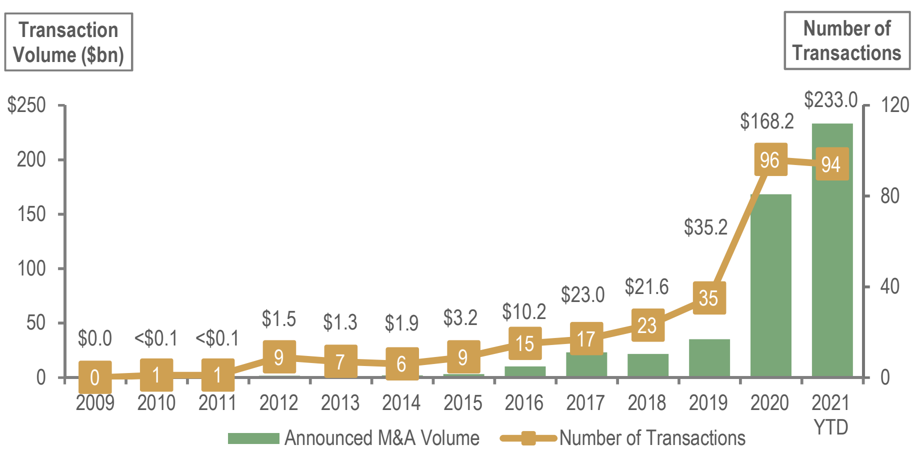
Yearly U.S. Listed SPAC IPO Volume



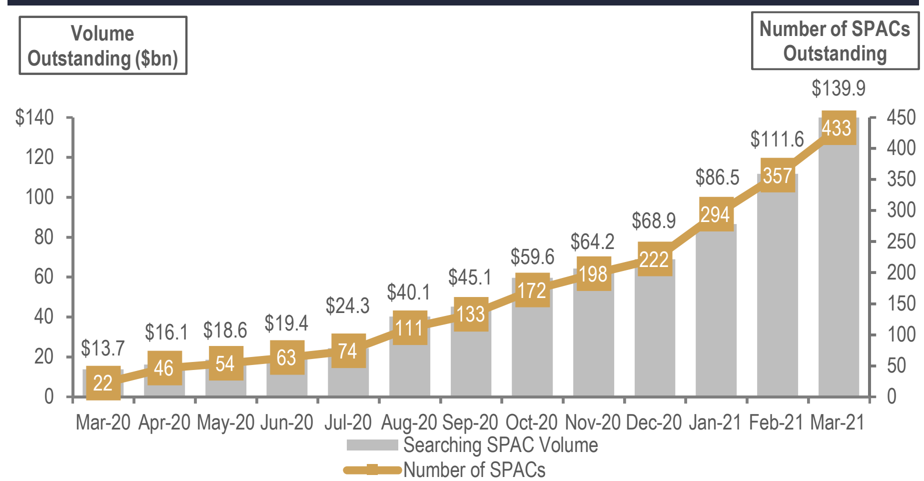
Monthly U.S. Listed SPAC IPO Volume



Yearly Announced SPAC Business Combination Volume



Searching SPAC Dry Powder Outstanding



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Source: SPACInsider as of 3/31/2021.

Activists Launching SPACs

New in Q1 2021

Leading activists have embraced the market's strong appetite for SPACs as a new source of funds

SPACs Sponsored by Activists

Filing Date	IPO Date	Size[1] ($mm)	Activist	Name	Target Characteristics
2/19/21	--	$1,000	ELLIOTT	Elliott Opportunity I	• Technology companies with large total addressable markets and growth characteristics
2/19/21	--	500	ELLIOTT	Elliott Opportunity II	• Technology companies with large total addressable markets and growth characteristics
2/25/21	4/7/21	480	CORVEX MANAGEMENT	CM Life Sciences III	• Life sciences tools, synthetic biology and diagnostics companies
1/29/21	3/19/21	690	GLENVIEW CAPITAL MANAGEMENT	Longview Acquisition II	• Healthcare companies but will consider other industries
2/4/21	2/24/21	600	HUDSON EXECUTIVE CAPITAL	Hudson Executive Investment III	• Growth-oriented technology companies or mature businesses with strong cash flow profiles
9/30/20	10/21/20	200	SARISSA CAPITAL	Sarissa Capital Acquisition	• U.S.-based healthcare companies
6/22/20	7/22/20	4,000	Pershing Square Capital Management	Pershing Square Tontine	• Large cap growth companies / "mature unicorns"

Activist-Sponsored SPAC Combinations

Annc. Date	Closing Date	EV ($mm)	Activist (SPAC)	Target	Details
3/29/21	--	$1,230	CORVEX MANAGEMENT (CM Life Sciences II)	somalogic	• SomaLogic is a healthcare company focused on studying proteins
2/22/21	--	3,425	STARBOARD VALUE (Starboard Value Acquisition Corp.)	Cyxtera	• Cyxtera is a data center provider of retail colocation services
2/10/21	--	2,071	CORVEX MANAGEMENT (CM Life Sciences)	sema4	• Sema4 is an AI-driven genomic and clinical data platform company
1/13/21	--	1,400	HUDSON EXECUTIVE CAPITAL (Hudson Executive Investment Corp.)	talkspace	• Talkspace is an online therapy company
11/20/20	2/12/21	1,457	GLENVIEW CAPITAL MANAGEMENT (Longview Acquisition Corp.)	Butterfly Network	• Butterfly Network is a creator of handheld probes that enable ultrasounds via smartphones
1/16/20	8/28/20	2,600	THIRD POINT (Far Point Acquisition Corp.)	Global Blu	• Global Blue is a technology company that helps international travelers shop tax free

Source: FactSet, Dealogic, press reports and public filings as of 3/31/2021.
1 Includes over-allotment proceeds where applicable.

Short Sellers Targeting De-SPACs

Since the beginning of 2020, there have been 8 short campaigns against "de-SPACs", 4 of which have occurred in 2021; "De-SPACs" have little time to prepare for these short attacks, with campaigns initiated on average 61 days following the merger

Selected Recent Short Campaigns Against "De-SPACed" Companies

Date[1]	Campaign (*Short Seller*)	Days Between Merger & Campaign	Campaign Details
3/2021	Lordstown (*Hindenburg Research*)	140	• Accused the Company of misleading investors about the capabilities of its electric pickup truck and making false statements regarding the number of pre-orders for the truck
3/2021	XL Fleet (*Muddy Waters*)	71	• Accused the Company of significantly exaggerating its order backlog; Muddy Waters also added that the Company could not compete with large car manufacturers on electrification due to a lack of valuable proprietary technology
2/2021	Clover (*Hindenburg Research*)	28	• Criticized the Company for allegedly not disclosing to investors that it was under an active investigation by the DOJ into the Company's business model and software offering
1/2021	Triterras (*Phase 2 Partners*)	65	• Criticized the Company for allegedly having significant related-party issues, including transactions connected to key executives and a significant business history with the SPAC's CEO
11/2020	Tattooed Chef (*Kerrisdale Advisers*)	35	• Criticized the Company's purported high valuation, concentrated customer base and poor sales growth, claiming that the majority of the Company's sales were derived from a single customer
11/2020	MultiPlan (*Muddy Waters*)	34	• Claimed that MultiPlan's business would deteriorate after the loss of a major client and that its financial reports were "engineered" to obscure poor performance
10/2020	Hyliion (*Bonitas Research*)	15	• Claimed that there was no scientific research to support the Company's claim that its hybrid technology could be retrofitted to any Class 8 diesel truck for an immediate 30% fuel efficiency savings
9/2020	Nikola (*Hindenburg Research*)	99	• Made various personal attacks against the Company's management team and alleged multiple instances of fraud

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Cleary M&A and Corporate Governance Watch

Mergers and Acquisitions, Corporate Governance, Shareholder Activism

UK Bids: Take-Private Boom Sees Negotiating Power Shift from Target Boards to Shareholders

By Sam Bagot & Dan Tierney on July 8, 2021

As we have covered previously, one of the most noticeable trends that has emerged in the current boom in UK public M&A activity[1] is the heightened level of target shareholder opposition to bids. This is manifesting itself in a number of ways, including through increased and novel "bumpitrage"[2] campaigns as well as through institutional investors becoming more vocal in expressing their discontent at proposed bids. There appears to be a general feeling among a number of the largest UK institutional investors that private equity are acquiring UK public companies "too cheaply".

Historically, the key negotiating ground in UK public bids has been with the target board before the public announcement of a firm bid. Once the bidder has reached agreement on price with the target board and obtained its recommendation, this has typically been sufficient to deliver a successful deal in the vast majority of cases, absent an intervention from an activist shareholder or competing bidder.

In the current environment, bidders need to assume that shareholders will be prepared to actively resist bids that they believe undervalue the target, even where the bidder has secured the support of the target board (which itself is becoming a more protracted and difficult process).[3] Depending on the extent of the opposition, bidders are increasingly needing to engage in post-announcement negotiations on price with significant target shareholders.

These tactics appear to be paying off, with three bidders in the last two weeks announcing increased offers in response to shareholder objections, notwithstanding that their initial offers were

- on 24 June, an affiliate of Blackstone increased its offer for St Modwen Properties PLC from 542 to 560 pence per share;
- on 29 June, an affiliate of Clayton, Dubilier & Rice increased its offer for UDG Healthcare PLC from 1,023 to 1,080 pence per share; and
- on 5 July, Ramsay Healthcare increased its offer for Spire Healthcare Group PLC from 240 to 250 pence per share.

In each case, the bidder's increased offer was stated to be "final". Under the Takeover Code, these "no increase" statements are binding and therefore prevent the bidder from subsequently further increasing its bid (typically unless a new competing bidder emerges). Declaring an offer "final" therefore sends a strong signal to shareholders that price negotiations have now ended and – absent a competing bidder emerging – shareholders will either need to support the final offer or see the deal fail. Similar tactics have been used in the past to fend off "bumpitrage" campaigns by activist shareholders.

[1] See: **UK Bids: Why the 'Reopening Trade' May Result in a Flurry of Activity Particularly for Domestically Focused FTSE 250 Companies**

[2] See: **UK Bid Activism – Two Recent Examples of Disclosure and Fairness Objections in Schemes of Arrangement**

[3] Another noticeable trend in the current environment has been the protracted and difficult negotiations with target boards with bidders increasingly having to make 5 or more private offers in order to secure the target board recommendation. See: Part 1 (Disagreements on Value) in **Private Equity Targets UK PLC Despite Rising Deal Complexity**

Cleary M&A and Corporate Governance Watch

LAZARD'S CAPITAL MARKETS ADVISORY GROUP

H1 2021 Review of Shareholder Activism

LAZARD

Observations on the Global Activism Environment in H1 2021

1 **U.S. Activity Leads Global Market in H1 2021**	• 94 new campaigns were initiated globally in H1 2021, in line with H1 2020 levels – Year-over-year stability buoyed by a strong Q1, with Q2's new campaigns launched (39) and capital deployed ($9.1bn) below multi-year averages • H1 was distinguished by several high-profile activist successes at global mega-cap companies, including ExxonMobil (Engine No. 1), Danone (Bluebell and Artisan Partners) and Toshiba (Effissimo, Farallon, et al.) • U.S. share of H1 global activity (59% of all campaigns) remains elevated relative to 2020 levels (44% of all campaigns) and in line with historical levels – The 55 U.S. campaigns initiated in H1 2021 represent a 31% increase over the prior-year period • After only initiating one new campaign in Q1 2021, Elliott launched five campaigns in Q2 2021 and returned to being the period's most prolific activist • H1 2021 activity in Europe slowed following a record-setting end to 2020; the region's 21 new campaigns included Elliott's agitation at GlaxoSmithKline and Bluebell's campaigns at Danone and Vivendi • 10 campaigns were launched at Japanese targets in H1, and the share of non-U.S. activity represented by Japanese targets (26%) reached the highest level in recent years – The activist success at Toshiba is viewed as a watershed moment in Japanese activism that may catalyze further scrutiny of Japan's corporate governance system
2 **Successful Attack on ExxonMobil Dominates Proxy Season**	• Engine No. 1's proxy fight at ExxonMobil – which saw the Company replace two incumbents in the lead-up to the AGM and an additional three seats won in the final vote – made Exxon the largest issuer ever to lose a proxy fight – Engine No. 1's campaign – which coupled "traditional" criticisms of performance and strategy with ESG attack vectors – was also noteworthy due to the wide margin of victory and broad shareholder support across the "Big 3" U.S. passive managers, pensions funds and active managers • The ousting of Toshiba's Chairman and one other Director at its 2021 AGM that followed an investigation into allegations of collusion to influence shareholder votes further showcased investors taking a more active stance to hold leaders accountable for perceived governance failures • A number of highly contentious proxy fights remain unresolved heading into H2 2021, including Starboard's ongoing agitation at Box for three Board seats and open criticism of KKR's recent "white squire" investment
3 **M&A-Related Activism Persists, with Opposition to Deals on the Rise**	• 44% of all activist campaigns in H1 2021 featured an M&A-related thesis, in line with the multi-year average of 40% – Among all global M&A-focused campaigns in H1 2021, 56% centered on scuttling or sweetening an announced transaction; among European M&A-focused campaigns, this figure was 100% ▪ Prominent examples of scuttle/sweeten campaigns included Canadian National (TCI) and Hilton Grand Vacations (Land & Buildings) – By contrast, campaigns pushing for an outright sale of the company occurred relatively less frequently, accounting for only 12% of M&A-related campaigns in H1 2021, below the multi-year average of 34%
4 **ESG Remains in the Spotlight**	• Investor support for E&S-related shareholder proposals reached new highs: 14% of all proposals passed in H1 2021, up from a three-year average of ~6%, as proposals at companies such as Chevron and DuPont secured broad-based backing • ESG equity inflows moderated in April and May (average monthly inflows of $2.2bn versus $3.7bn in Q1) but remain on pace to surpass 2020's record • Environmental issues dominated the regulatory conversation as the SEC aims to propose rules on mandatory climate disclosures as early as October
5 **Significant Dry Powder for SPAC M&A**	• Record-breaking SPAC activity continued into H1 2021, with 163 SPACs completing deals and $129bn of dry powder still searching for targets • Short activism targeting de-SPACed companies has emerged as an increased threat in H1 2021, with prominent short sellers, such as Hindenburg Research, attacking high-profile de-SPACs such as DraftKings, Lordstown Motors and Clover Health

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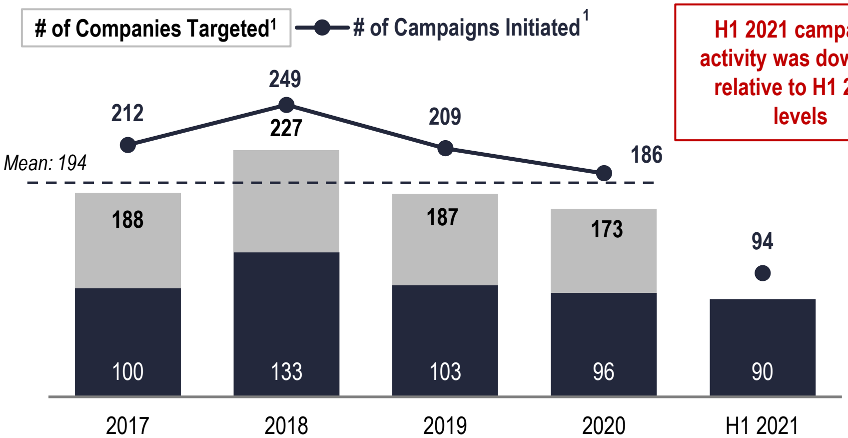
Source: FactSet, press reports and public filings as of 6/30/2021.

Global Campaign Activity and Capital Deployed

($ in billions)

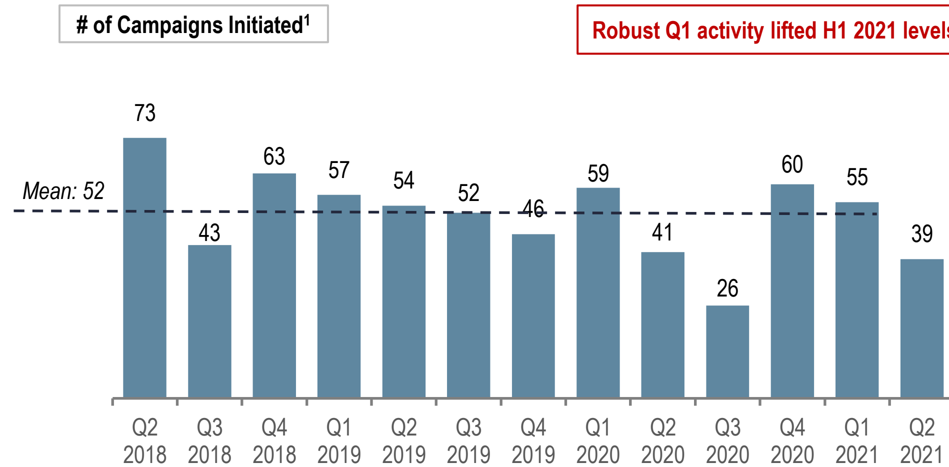
Annual Campaign Activity[1]

H1 2021 campaign activity was down 6% relative to H1 2020 levels

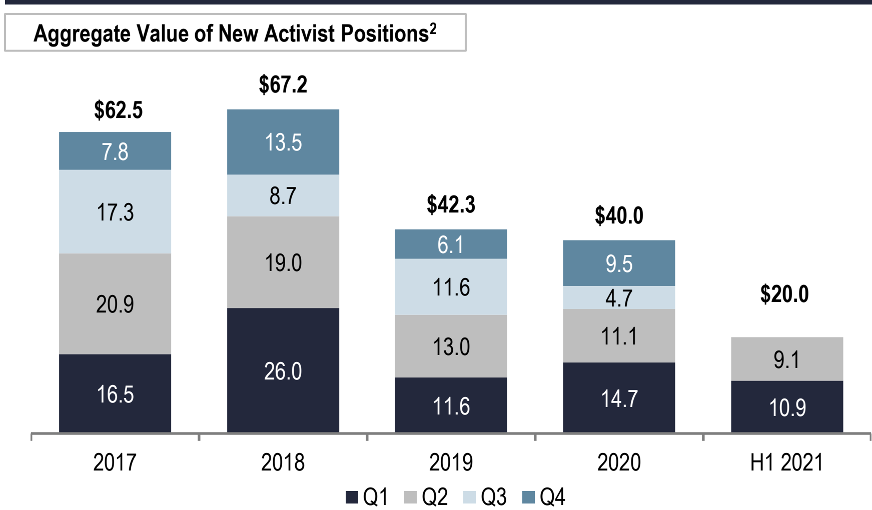


Quarterly Campaign Activity

Robust Q1 activity lifted H1 2021 levels



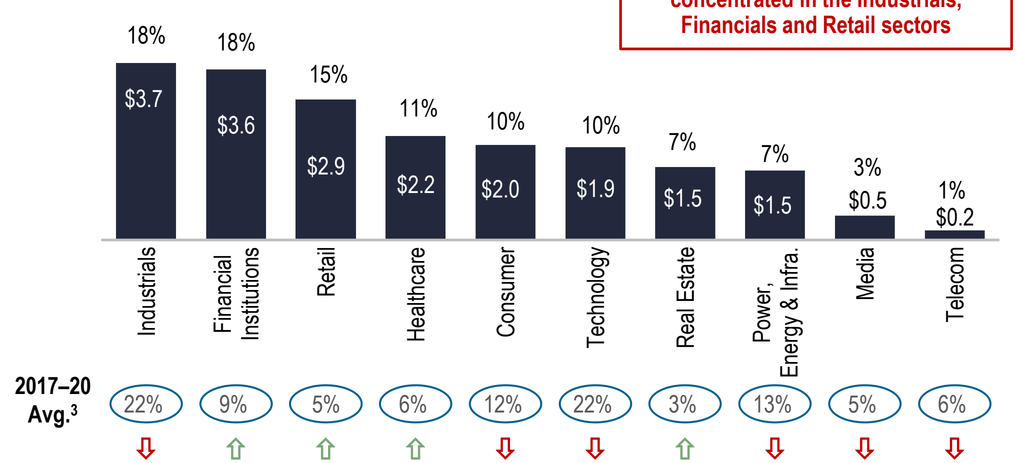
Capital Deployment in New Campaigns ($bn)



H1 2021 Capital Deployed by Sector

Aggregate Value of New Activist Positions[2]

Over half of H1 capital deployed was concentrated in the Industrials, Financials and Retail sectors



Source: *FactSet, press reports and public filings as of 6/30/2021.*

Global Activist Activity in H1 2021

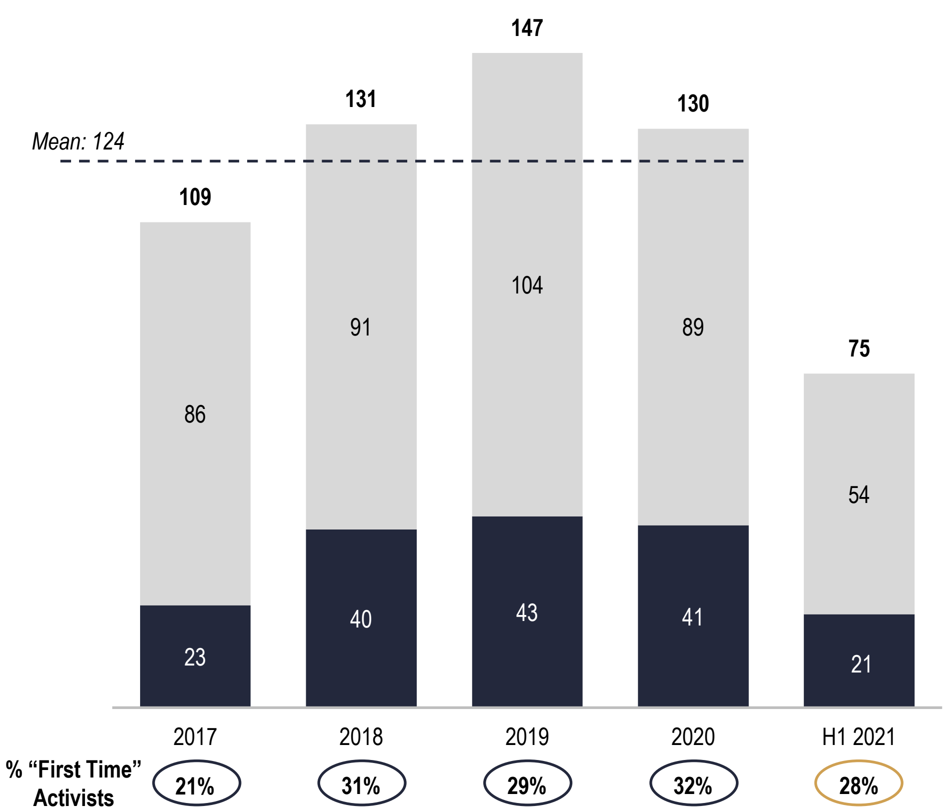
($ in billions)

Following a muted Q1, Elliott initiated five new campaigns in Q2, regaining its rank as the most prolific activist globally; initiations by first-time activists were in-line with historic levels, with Engine No. 1 capturing meaningful attention

Investors Launching Activist Campaigns

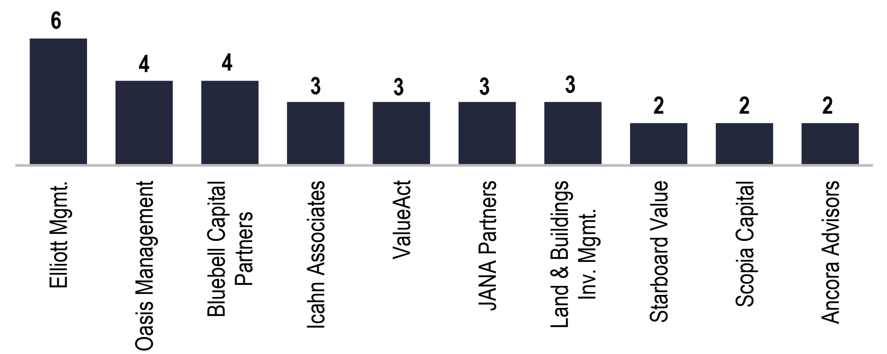
While campaigns from first-timers increased from Q1 lows, existing activists accounted for a greater share of recent activity

■ # of "First Timers"

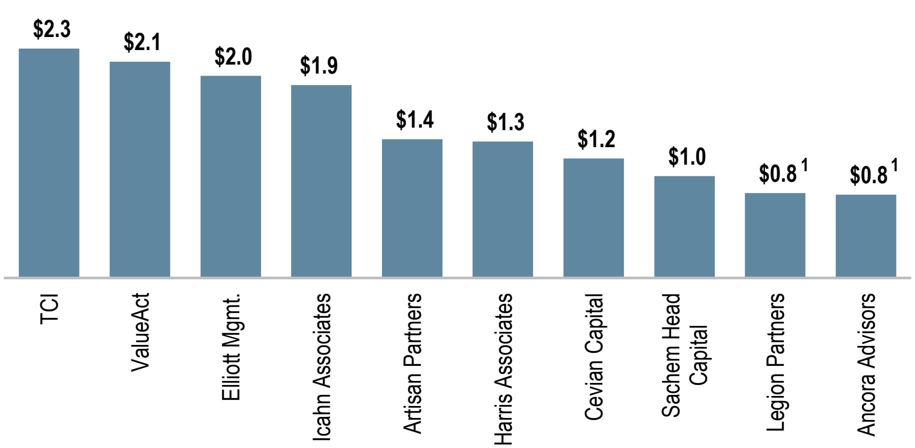


H1 2021 Activist Activity by Campaigns Launched

Elliott launched five new campaigns in Q2, a significant uptick from just one campaign in Q1



H1 2021 Capital Deployed ($bn)



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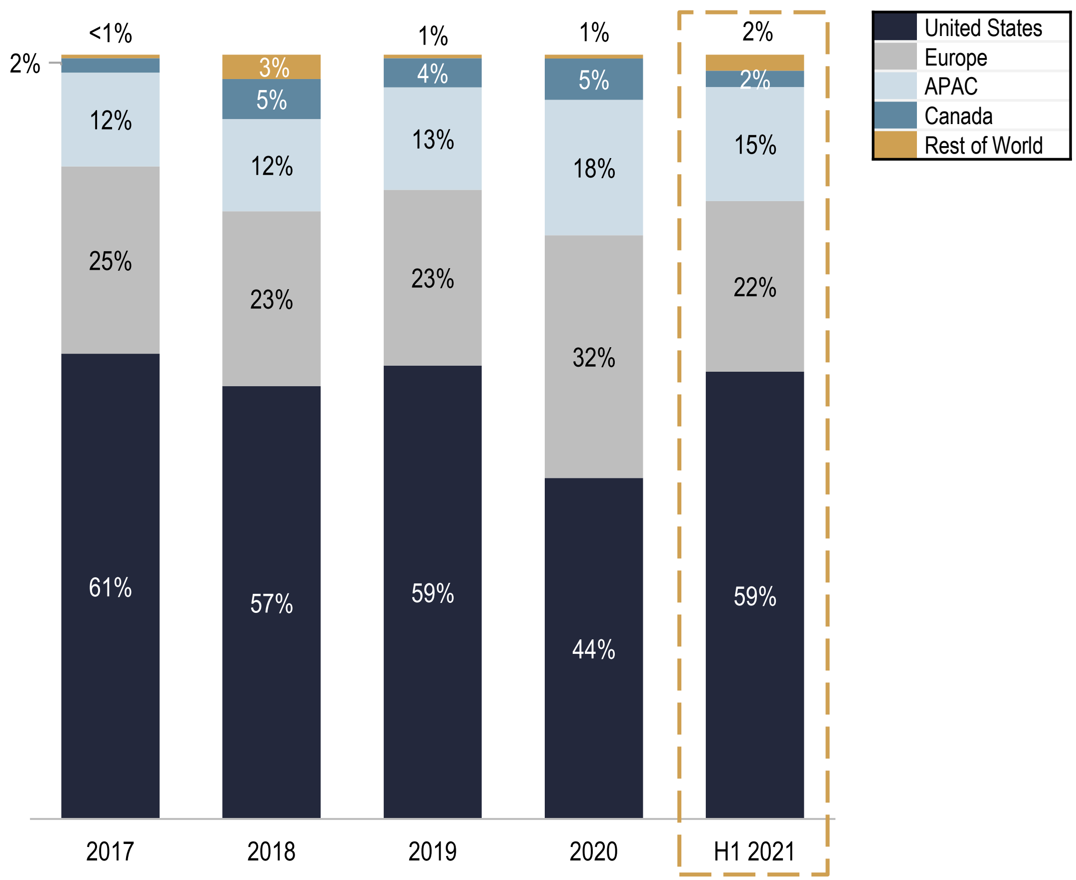
Source: FactSet, press reports and public filings as of 6/30/2021.

U.S. Rebound Driving H1 Global Activity

($ in billions)

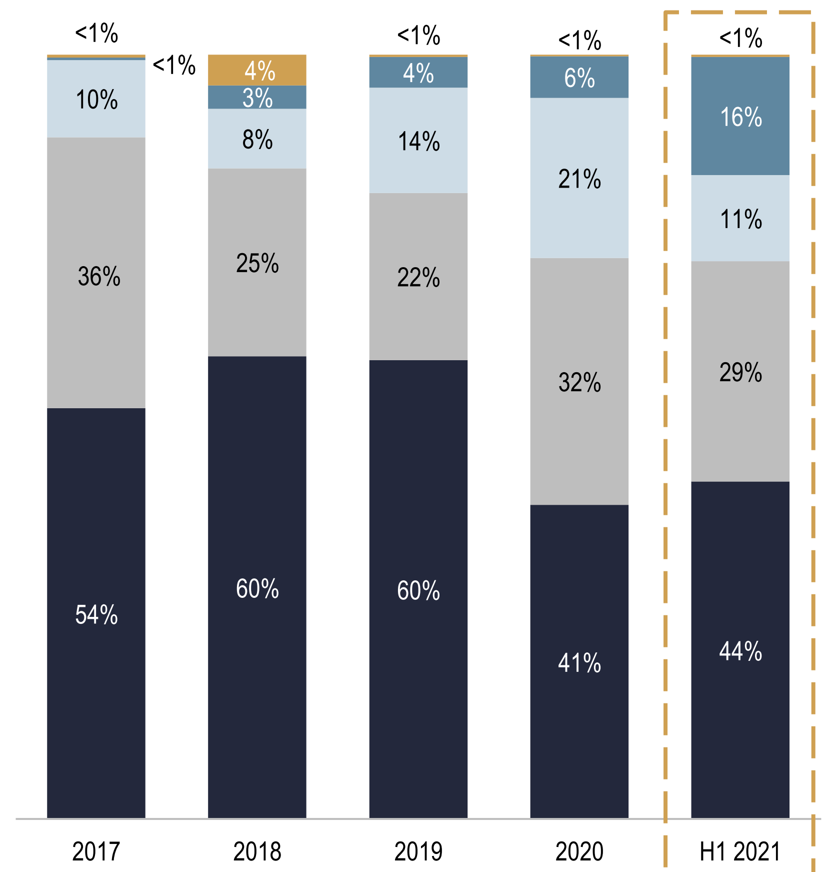
H1 2021 U.S. activity remained elevated relative to 2020 levels, representing 59% of global campaigns; capital deployed in the U.S. increased Y-o-Y, representing 44% of capital deployed, but was below multi-year averages (54%) and its Q1 2021 level (56%)

Regional Breakdown of Campaigns Initiated by Year



Regional Breakdown of Capital Deployed by Year

Significant increase in Canada reflects TCI's $2.3bn stake at Canadian National

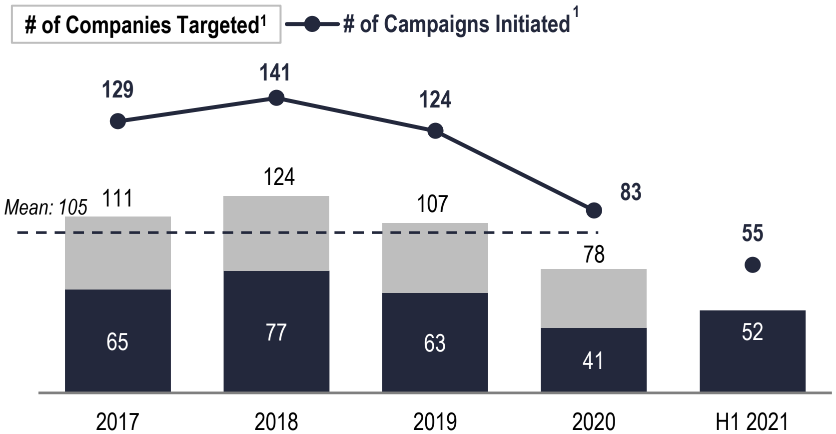


Source: FactSet, press reports and public filings as of 6/30/2021.

U.S.: Campaign Activity and Capital Deployed

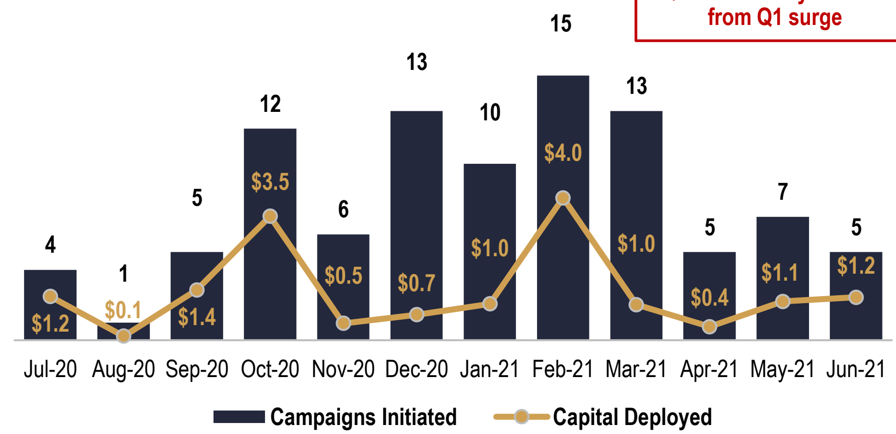
($ in billions)

U.S. Annual Campaign Activity[1]

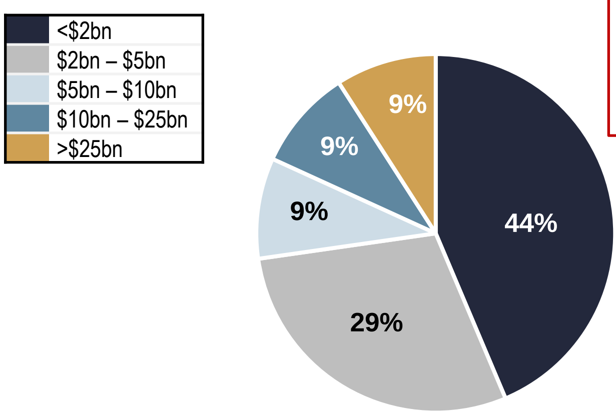


U.S. Campaign Activity by Month (LTM)

Q2 2021 activity receded from Q1 surge



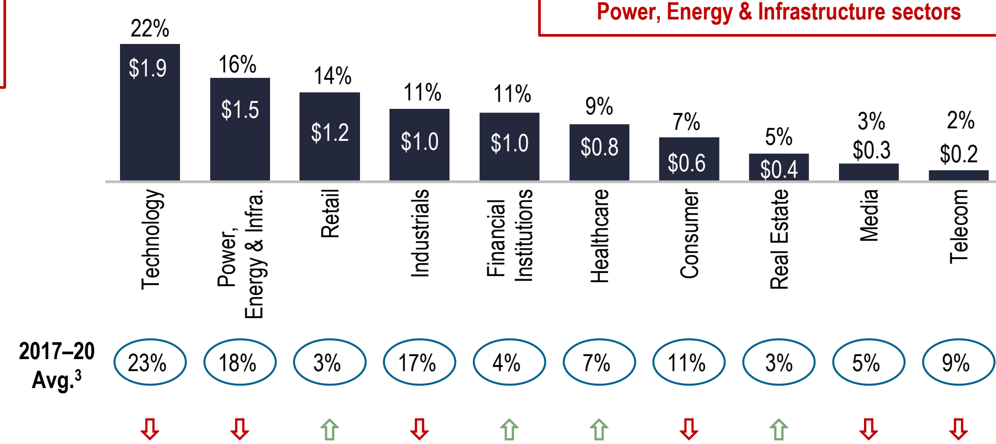
U.S. Market Cap. Breakdown of New Campaigns, H1 2021[2]



Small-cap companies (<$2bn) were again the most targeted by activists after large-caps ($25bn+) came under pressure in the back half of 2020

H1 2021 U.S. Capital Deployed by Sector[2]

In contrast with global targets, U.S. activism was concentrated in the Technology and Power, Energy & Infrastructure sectors



U.S.: Notable H1 2021 Public Campaign Launches and Developments

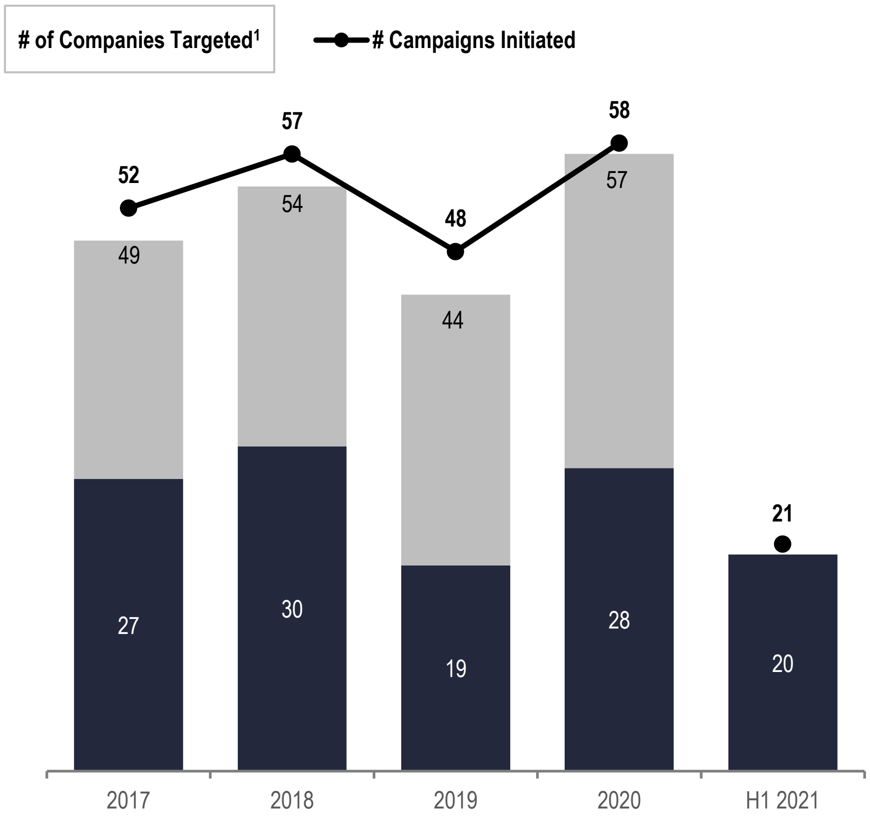
($ in billions)

Launch Date	Company / Market Cap	Activist	Highlights
6/21	Dropbox $8.9	ELLIOTT	• In June, *The Wall Street Journal* reported that Elliott had taken a ~10% stake in Dropbox and had been holding private conversations with management
5/21	Allstate $40.8	ICAHN ENTERPRISES L.P.	• In May, *Bloomberg* reported that Icahn had taken a stake in Allstate and that the activist supported the Company's plans to cut costs and reinvigorate growth by selling products directly to consumers
5/21	Duke Energy $79.8	ELLIOTT	• In May, *The Wall Street Journal* reported that Elliott had taken a stake in Duke Energy and was pushing for Board representation and asset disposals • A week later, Elliott published a letter pushing the Company to appoint new independent Directors and form a strategic review committee to explore separating the Company into three regionally focused utilities
5/21	Hilton Grand Vacations $3.9	LANDandBUILDINGS	• In May, Land & Buildings published a presentation and corresponding letter criticizing Hilton Grand Vacations' acquisition of Diamond Resorts and indicating that it would vote against the deal; the presentation cited Diamond's inferior growth profile and claimed that "[Hilton Grand Vacations was] overpaying for Diamond Resorts at 10x 2019 EBITDA"
2/21	Kohl's $8.3	Ancora, Legion Partners, Macellum, 4010	• In March, the activist group filed a definitive proxy statement for its slate of nominees and sent a letter to shareholders criticizing the "chronic underperformance of Kohl's stock price" and "deeply flawed executive compensation practices," among other issues • Kohl's entered into a settlement agreement with the activists whereby the Company would add two new independent Directors to its Board
12/20	ExxonMobil $172.9	Engine No. 1	• In May, ISS recommended shareholders support three of Engine No. 1's Director nominees at Exxon; Glass Lewis recommended shareholders vote for two of Engine No. 1's nominees • Later in May, Exxon publicly committed to adding two additional Directors, one with climate expertise and the other with energy expertise • At the 2021 AGM, Engine No. 1's nominees Gregory Goff, Kaisa Hietala and Alexander Karsner were elected to the Company's Board
3/20	Delek US $0.9	ICAHN ENTERPRISES L.P.	• In February, Icahn nominated three Directors for election to Delek's Board at its 2021 AGM; Icahn stated its nominees would push the Company to cease operations at two refineries • In March, Icahn sent a letter criticizing the Company's executive compensation practices and stating that Delek CEO Ezra Yemin was paid "extremely well compared to the results" • Delek shareholders rejected Icahn's nominees at the May AGM
9/19	Box $2.2	Starboard Value	• In April, KKR invested $500mm in Box in exchange for a Board seat, which Starboard criticized as a "white squire" defensive tactic • In May, Starboard nominated four Directors for election, including managing member Peter Feld • In July, Box revealed Starboard had sought and was invited to participate in the KKR investment, demanded any settlement require Feld gaining a Board seat and threatened a proxy fight unless Box fired its CEO or sold itself

Europe: Campaign Activity

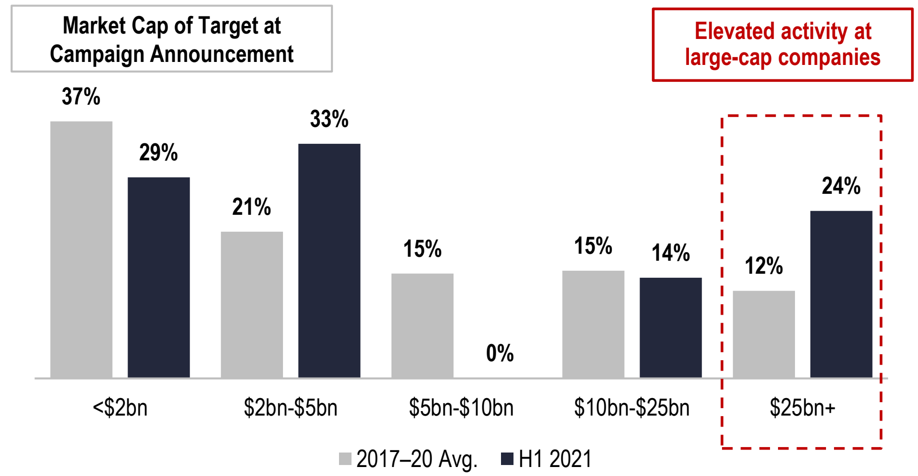
($ in billions)

European Annual Campaigns Activity[1]

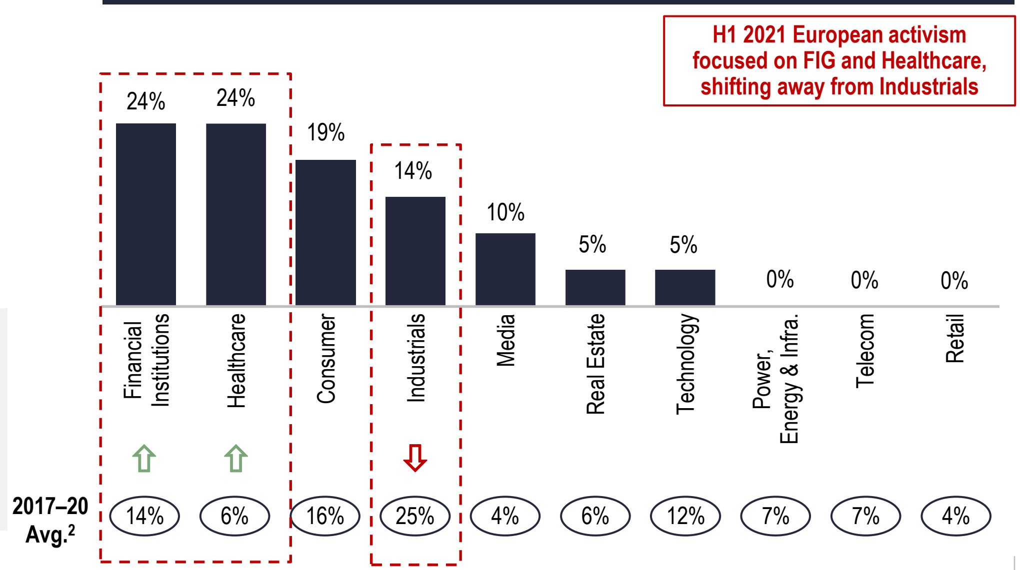


- **While European activist campaigns reached record levels in H2 2020, H1 2021 saw a decreased level of campaign activity**
- **However, activists may be repositioning in a "post-COVID" market, and launched more campaigns in Q2 than in Q1 2021**

H1 2021 European Campaigns by Target Market Cap



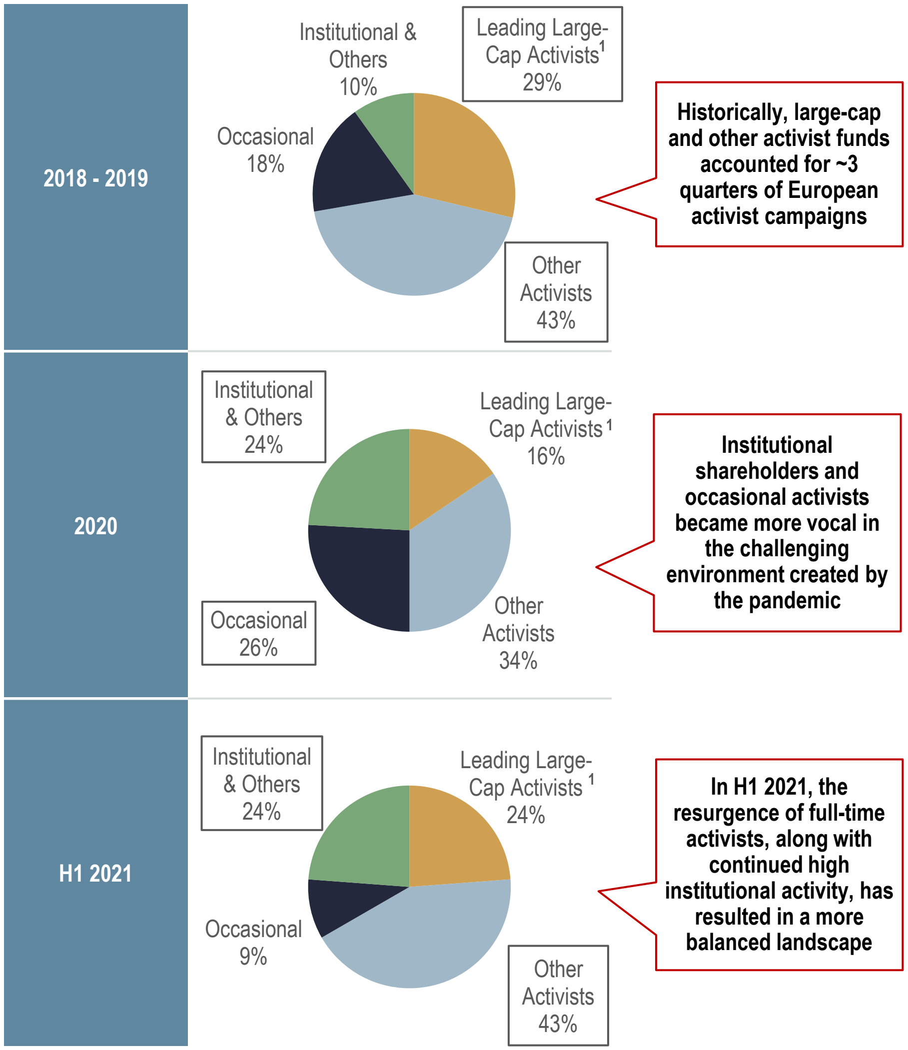
H1 2021 Campaigns by Sector (in %)



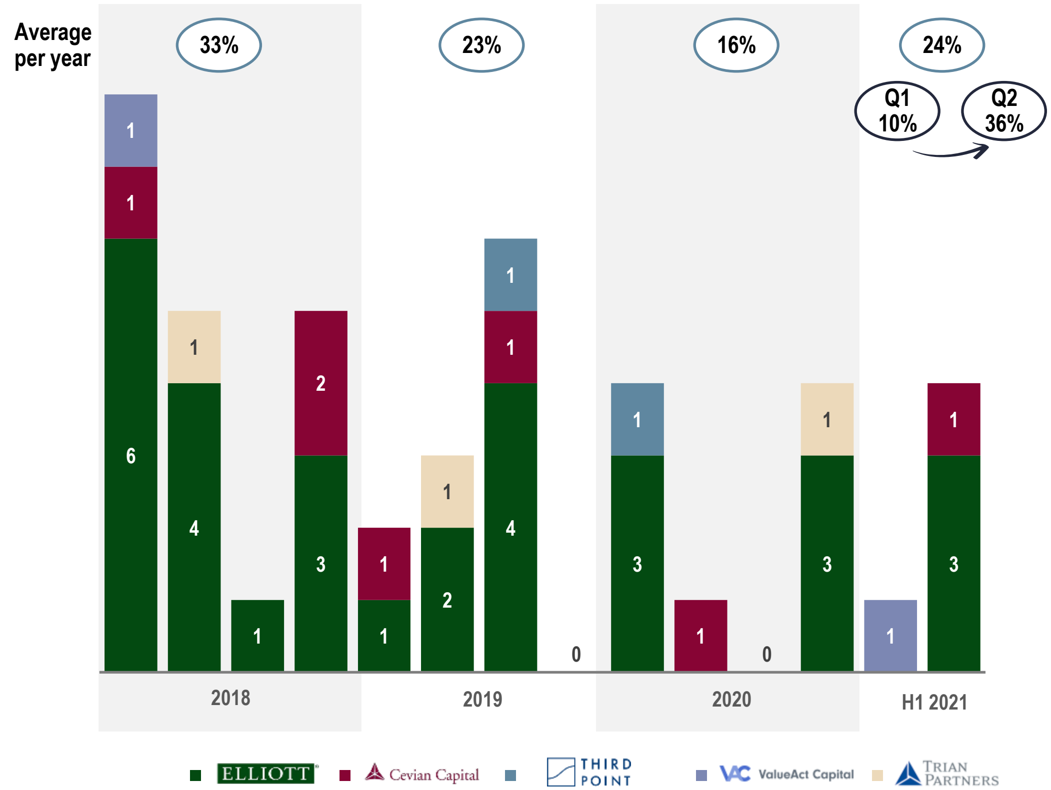
Source: *FactSet, press reports and public filings as of 6/30/2021.*

Europe: Return of Large-Cap Activists in a Diversified Activism Landscape

Campaigns by Activist Category



Resurgence of Leading Large-Cap Activists[1]



- The prevalence of activist campaigns by large-cap activists[1] shrunk as a proportion of total campaigns over the last three years
- This year, there has been a resurgence of large-cap activists, which accounted for ~36% of campaigns in Q2 2021 vs. 10% in Q1 2021 and ~16% in 2020

Europe: Notable H1 2021 Public Campaign Launches and Developments

($ in billions)

Launch Date	Company / Market Cap[1]	Activist	Highlights
6/21	AVIVA $23.5	Cevian Capital	• In June, Cevian Capital disclosed a ~5% stake in Aviva and criticized the Company's cost structure and strategic decisions, while stating that Aviva could increase its value per share and dividend • The public statement followed the newly appointed CEO's decision to exit operations in several non-core countries
5/21	vivendi $42.8	BLUEBELL CAPITAL PARTNERS; ARTISAN PARTNERS	• In May, Bluebell demanded that Vivendi pay an extraordinary cash dividend following the spin-off of Universal Music Group and move a planned listing from Euronext to NYSE or consider a dual listing • In June, Bluebell sent a letter to the French regulator (AMF) raising concerns that the spin-off was considered without informing investors or seeking their approval • A few days later, Artisan Partners said it would vote against Vivendi's planned spin-off • Later in June, the separation resolution passed with ~99% approval from shareholders
4/21	gsk GlaxoSmithKline $93.6	ELLIOTT	• In April, the *Financial Times* reported that Elliott had built a multi-billion-pound stake in GSK, and stated that the stake building caught GSK off-guard as there had been no prior awareness of the position building • In July, Elliott published a letter criticizing persistent operational and share price underperformance and calling for Board refreshment as well as a credible process to determine leadership at the separated Biopharma and Consumer Health businesses, among other demands; GSK issued a response the following day

Launch Date	Company / Market Cap[1]	Activist	Highlights
3/21	Creval $1.0	PETRUS ADVISERS; Alta Global	• In February, Petrus stated that the Company should pursue the Crédit Agricole transaction only if the offer was raised—a few months after its first criticism • In March, Alta Global urged Crédit Agricole to increase its offer • In April, Crédit Agricole increased its offer for the Company and reached an agreement with activist investors to tender their shares for €12.50 per share • In May, Crédit Agricole acquired 95% of Creval shares via tender offer and will initiate a squeeze-out procedure
1/21	DANONE ONE PLANET. ONE HEALTH $45.4	BLUEBELL CAPITAL PARTNERS; ARTISAN PARTNERS	• In January, Bluebell demanded the separation of the Chairman and CEO roles and for the Company to seek a new CEO given structural underperformance • In February, Artisan called on Danone to improve performance, separate the Chairman and CEO roles and replace its CEO • In March, the Chairman and CEO resigned from both roles • In May, Antoine de Saint-Affrique was appointed CEO of the company
12/20	Alkermes $3.3	ELLIOTT; SARISSA CAPITAL MANAGEMENT LP	• In April, Sarissa Capital Management gained a Board seat following discussions concerning Alkermes' strategy and Board refreshment efforts • In May, Alkermes added Emily Peterson Alva to its Board, which Elliott publicly supported

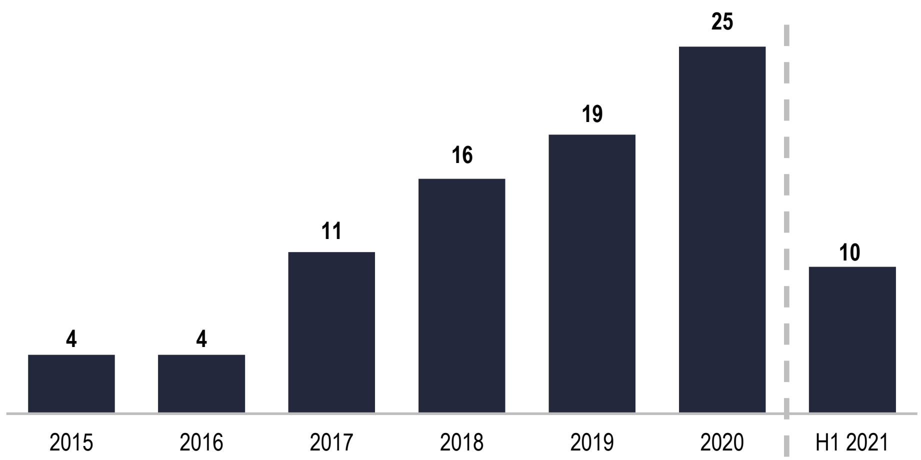
Japan: Shareholder Activism Remains Elevated

($ in billions)

With 10 new campaigns in H1 2021, Japan remains one of the most targeted countries outside of the U.S. (26% of new non-U.S. campaigns); activism has been driven by both "blue-chip" global activists and local players

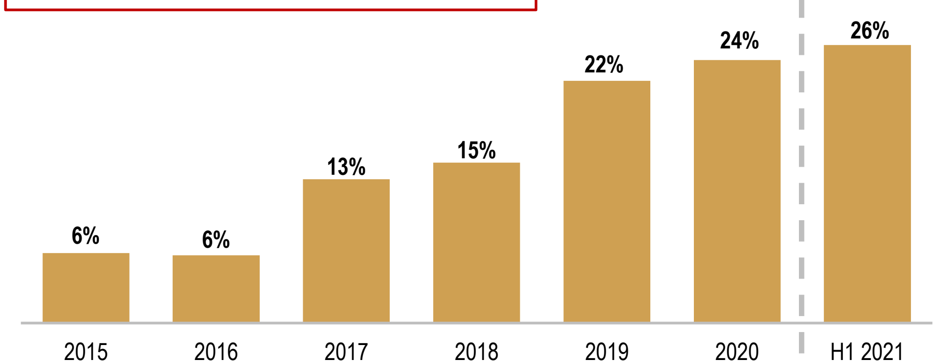
- **Activists' success at Toshiba is seen as a transformational event in Japanese activism history that may lead to further reform of Japan's corporate governance system**

Campaigns against Japanese Companies



% of Japanese Campaigns of Non-U.S. Campaigns

Activity in Japan relative to non-U.S. campaigns reached new highs



Notable Campaign Initiations in Japan

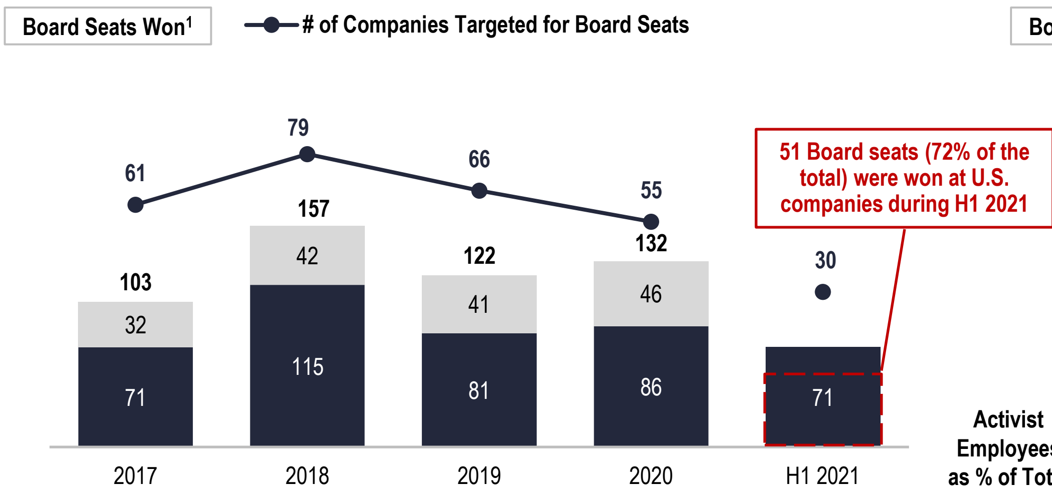
Launch Date	Company / Market Cap / Activist(s)	Highlights
6/20[1]	TOSHIBA $14.6[1] Effissimo Capital Management, 3D Investment Partners, Farallon, Oasis	• At the March 2021 EGM, Effissimo's proposal for an independent investigation of the Company's prior-year AGM was passed; the investigation found that Toshiba and the Japanese Ministry of Economy, Trade and Industry colluded to undermine shareholders' rights at the AGM by influencing voting inappropriately • In April, Toshiba announced it had received a non-binding offer to be taken private by CVC Capital Partners for ~$20bn; Board Chair Osamu Nagayama commented that the Company did not view the offer as concrete and feasible given that it was conditional on a litany of matters; however, Toshiba's CEO Nobuaki Kurumatani resigned amid the turmoil • In June, Toshiba announced that it would remove two incumbent Directors and two executives following the investigation into the 2020 AGM • At the June 2021 AGM, Board Chair Osamu Nagayama and Audit Committee Member Nobuyuki Kobayashi were voted off Toshiba's Board; following the vote, Director George Olcott resigned from the Board in protest of Nagayama's ousting
5/21	Seven & i Holdings $37.2 ValueAct Capital	• In May 2021, ValueAct initiated an ~4.4% position in Seven & i Holdings and pushed for a break-up of the Company, stating in a letter to shareholders that Seven & i's sum-of-the-parts valuation was far greater than its current market capitalization • In June 2021, it was reported that Seven & i intended to sell down its stake in home décor chain Francfranc in order to heighten its focus on its core business

Source: FactSet, press reports and public filings as of 6/30/2021.

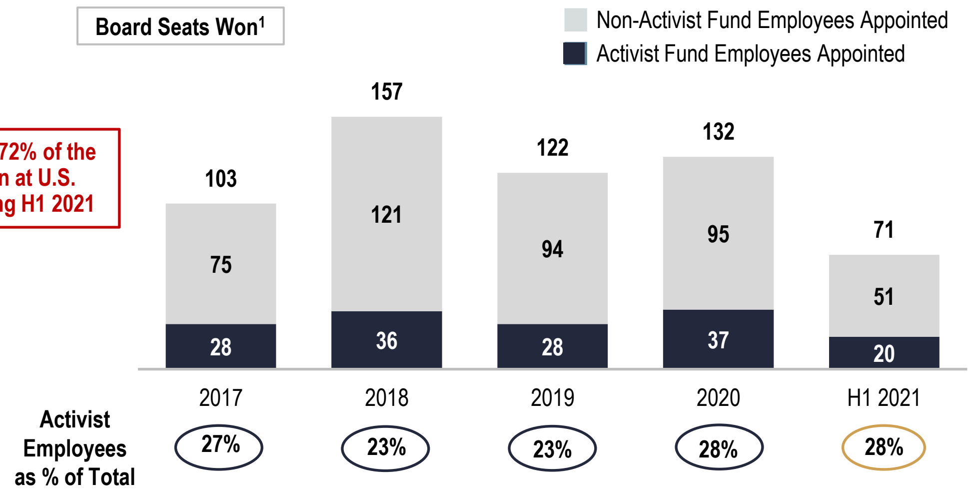
Global Board Seats Won

The 71 Board seats won by activists in H1 2021 were below prior-year levels; Ancora and Starboard were the most successful activists in securing Board seats, winning eight and six seats, respectively

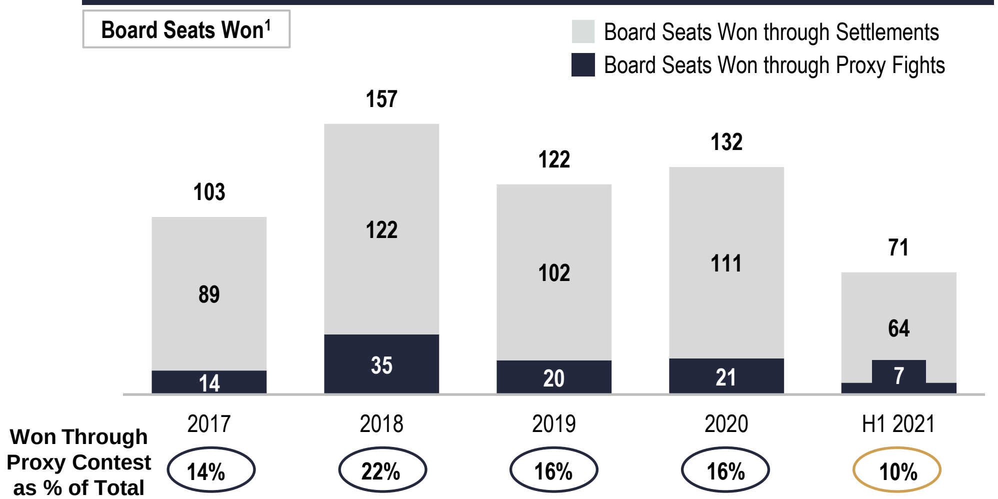
Board Seats Won[1]



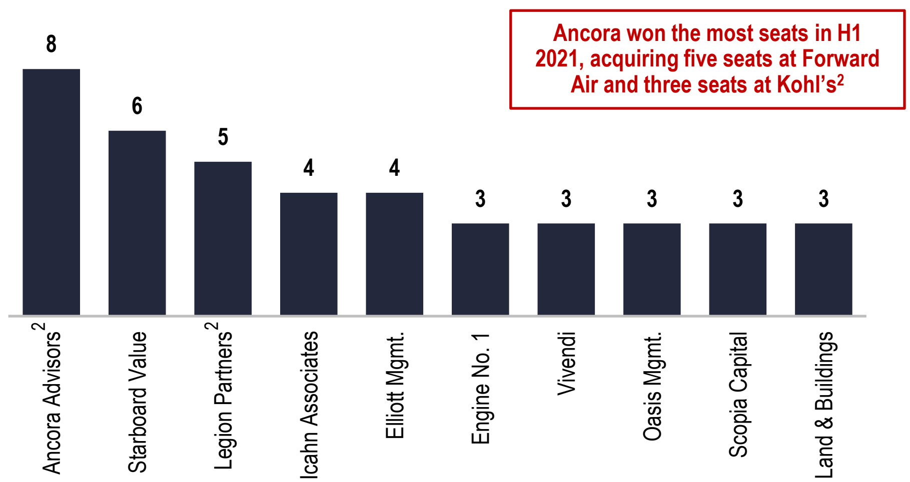
Non-Activist Employees vs. Activist Employees Appointed as Directors



Settlements vs. Proxy Contests



H1 2021 Board Seats Won by Activists



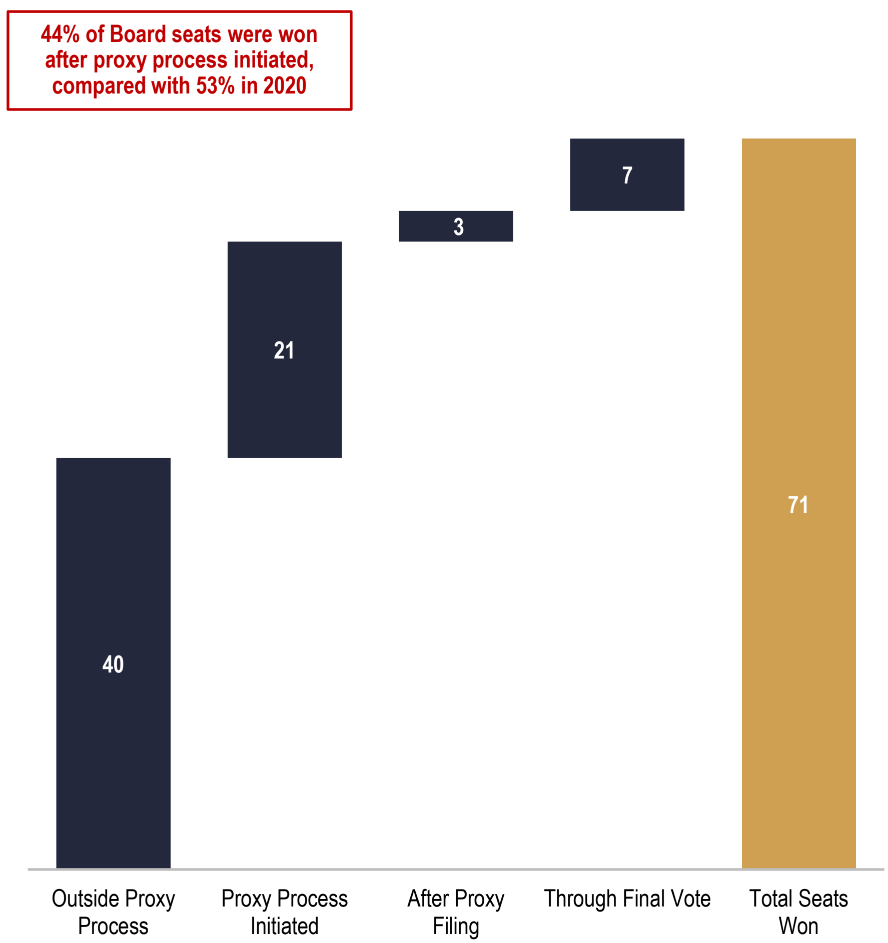
Source: *FactSet, press reports and public filings as of 6/30/2021.*

Further Detail on Following Pages

2021 Proxy Contest Results

H1 2021 saw the conclusion of several pending proxy fights, with notable activist Board seats won at ExxonMobil, Lagardère and Kohl's

Timing of Board Seat Wins



Notable H1 2020 Contested Votes

Company / Activist	ISS Rec.	Glass Lewis Rec.	Activist Successful?
Delek US / Icahn Enterprises L.P.	0 / 3 Dissident Nominees	0 / 3 Dissident Nominees	✘
Genesco / Legion Partners	0 / 4 Dissident Nominees	2 / 4 Dissident Nominees	Ongoing
ExxonMobil / Engine No.1	3 / 4 Dissident Nominees	2 / 4 Dissident Nominees	✓ (3 / 4 Dissident Nominees Elected)
Kohl's / Legion Partners, Ancora, Macellum Capital Management, 4010	--	--	✓ (3 / 5 Appointed via Settlement)
Lagardère / Vivendi, Amber Capital	--	--	✓ (4 / 4 Appointed via Settlement)
Box / Starboard Value	--	--	Ongoing
Blucora / Ancora	1 / 4 Dissident Nominees	0 / 4 Dissident Nominees	✘
eHealth / Starboard Value	--	--	✓ (1 / 4 Appointed via Settlement)

Source: ISS Governance, public filings and press reports as of 6/30/2021.

Engine No. 1 and Its Campaign at ExxonMobil

With two industry veterans at the helm, the newly launched Engine No. 1 has made an immediate impact with its high-profile campaign at ExxonMobil that tied together traditional criticisms of underperformance and capital allocation decisions with an intense public scrutiny of ESG issues

Overview of Engine No. 1

Key Personnel

Chris James, *Founder*

- James co-founded one of the largest tech hedge funds, Andor Capital Management, before leaving in 2004 to start another fund called Partners Fund Management where he managed over $5bn in total assets at its peak
- Engine No.1's AUM is largely sourced from James' personal wealth

Charlie Penner, *Head of Engagement*

- Penner is a former partner and Chief Legal Officer at prolific activist firm JANA Partners, for which he led the joint effort with CalSTRS to push Apple to add child safety features to its products
- Penner headed JANA's impact investing effort while at the firm

Mission / Purpose

- **Engine No. 1, which launched on 12/1/20, believes "a company's performance is greatly enhanced by the investments it makes in workers, communities and the environment" and seeks to engage as active owners on these topics**

Far too many companies fail to incorporate externalities into their business strategies. Having built companies from the ground up across multiple industries in transition, ***we have a first-hand understanding of how a company's performance and its broader impact are intrinsically linked.***

Framing the debate as 'shareholder capitalism versus stakeholder capitalism' does both parties a disservice. Over the long-term, shareholder and stakeholder interests align, and companies that invest in their stakeholders are better, stronger companies as a result. *Through active ownership, we will seek to leverage our long duration capital and operational expertise to build long-term value by focusing on where we can have positive impact.*

CHRIS JAMES, ENGINE NO. 1 PRESS RELEASE, 1 DECEMBER 2020

Key Vectors of Engine No. 1's Attack on ExxonMobil

Long-Term, Sustained Share Price Underperformance

"ExxonMobil has dramatically underperformed for shareholders over any relevant time period"

Poor Capital Allocation Discipline

"A focus on chasing production growth over value has resulted in an undisciplined capital allocation strategy and has destroyed value even during periods of higher oil and gas prices"

Board Lacks Industry Experience and Climate Competency

"A lack of successful and transformative energy experience on the Board has left ExxonMobil unprepared and threatens continued long-term value destruction"

Failure to Address Energy Transition Strategy

"A refusal to accept that fossil fuel demand may decline in decades to come has led to a failure to take even initial steps towards evolution, and to obfuscating rather than addressing long-term business risk"

Source: Engine No. 1 website, BoardEx, FactSet and press reports.

Significant Impact on ExxonMobil's Boardroom

In spite of its de minimis ownership (<0.1%), Engine No. 1's campaign directly or indirectly resulted in 5 of 12 Board seats turning over

ExxonMobil Directors as of December 2020

Darren Woods *(1/16)*

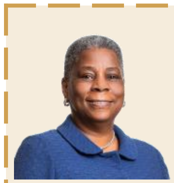
Chairman and CEO, ExxonMobil

Joseph Hooley III *(1/20)*

Former Chairman and CEO, State Street

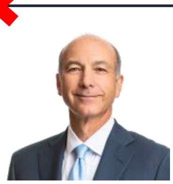
Angela Braly *(5/16)*

Former Chairwoman, President and CEO, WellPoint (now Anthem)



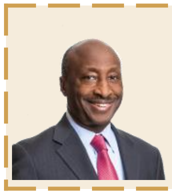
Ursula Burns *(11/12)*

Former Chairwoman and CEO, Xerox



Steven Kandarian *(2/18)*

Former Chairman, President and CEO, MetLife



Kenneth Frazier* *(5/09)*

Chairman and CEO, Merck[1]

Dr. Susan Avery *(2/17)*

President Emerita, Woods Hole Oceanographic Institution

Douglas Oberhelman *(5/15)*

Former Chairman and CEO, Caterpillar

Samuel Palmisano *(1/06)*

Former Chairman, President and CEO, IBM

William Weldon[2] *(5/13)*

Former Chairman and CEO, Johnson & Johnson

Engine No. 1 Nominees

Gregory Goff

Former CEO, Andeavor

Kaisa Hietala

Former EVP of Renewable Products, Neste

Alexander Karsner

Former U.S. Assistant Energy Secretary for Energy Efficiency and Renewable Energy

Anders Runevad

Former CEO, Vestas Wind Systems

Added by XOM After Campaign Launch / Before Vote

Jeff Ubben *(3/21)*

Founder & Managing Partner, Inclusive Capital Partners; Founder & Chairman, ValueAct

Mike Angelakis *(3/21)*

Former CFO, Comcast

Wan Zulkiflee *(1/21)*

Former President and CEO, Petronas

Elected to Board at 2021 AGM

✖ **Not elected to Board at 2021 AGM**

* **Lead Independent Director**

Source: BoardEx, Company filings.

Wide-Ranging Support for Change at ExxonMobil

Engine No. 1's multi-faceted critique of ExxonMobil garnered wide support across the shareholder base and other major third parties

	Institution	% O/S XOM[1]	Engine No. 1 Nominees Supported	Support Rationale
Shareholders	Vanguard	8.3%	Goff and Hietala	• *"We have further observed that an increasingly pressing need exists for Exxon to better align its climate strategy with (1) target setting in line with global peers and (2) its public policy efforts related to climate risks."*
Shareholders	BlackRock	6.7%	Goff, Hietala and Karsner	• *"Exxon has historically recruited directors, who, while highly accomplished in their own right, lacked specific energy industry experience. We feel that having a broad range of energy experience on Exxon's Board could assist in further guiding the strategic direction of the company"*
Shareholders	State Street	6.0%	Hietala and Karsner	• *"[Hietala and Karsner would help Exxon's Board] oversee an energy transition strategy, underpinned by an appropriate capital allocation approach"*
Shareholders	T. Rowe Price	0.5%	Goff, Hietala and Karsner	• Not publicly stated
Shareholders	CalSTRS	0.2%	Goff, Hietala, Karsner and Runevad	• *"It's time for change at ExxonMobil, and change is coming… the recommendations by Glass Lewis and ISS reaffirm our belief that ExxonMobil's board must be strengthened to drive systemic change and help ensure a long-term energy transition strategy."*
Proxy Advisors / Other	ISS	N/A	Goff, Hietala and Karsner	• *"Adding dissident nominees Goff and Hietala will address the need for independent industry expertise, which would assist in rectifying operational concerns; Hietala's experience, along with the addition of dissident nominee Karsner, would also elevate the Board's ability to assess the energy transition"*
Proxy Advisors / Other	Glass Lewis	N/A	Goff and Karsner	• *"We believe more proactively addressing the environmental, social and governance risks that are currently impacting the Company will ultimately translate into improved operational and financial performance as well as greater total returns and shareholder value"*
Proxy Advisors / Other	The Church of England	--[2]	Goff, Hietala, Karsner and Runevad	• *"The Church Commissioners for England are pleased to lend their support to Engine No. 1's proposals to re-energise ExxonMobil. Calls for the company to address shareholders' concerns about strategy, governance and climate mitigation… have gone unheeded"*

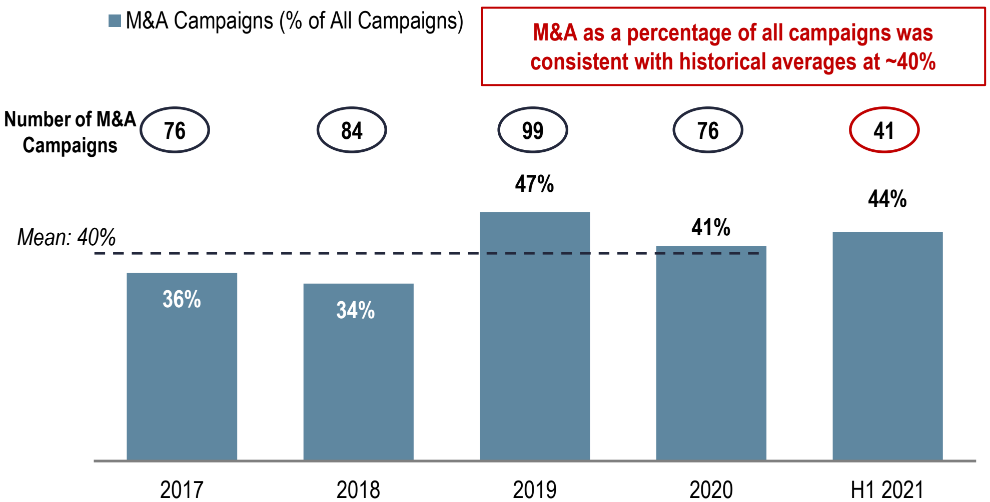
Source: FactSet as per latest filings; ISS, Glass Lewis, Firm websites and public filings.

Sustained Prominence of M&A-Related Campaigns Globally

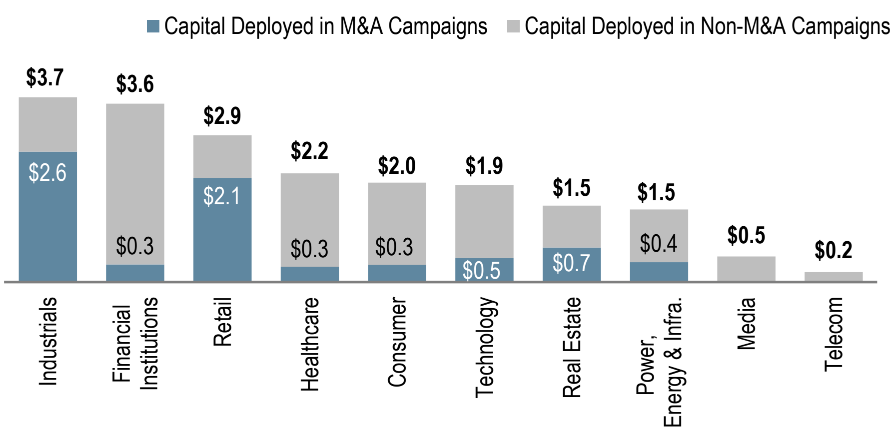
($ in billions)

While the prevalence of M&A as an overall campaign objective in H1 2021 was consistent with prior-year levels, the mix of M&A-related activism continued to shift towards challenging existing transactions, with fewer occasions of activists pushing for a sale

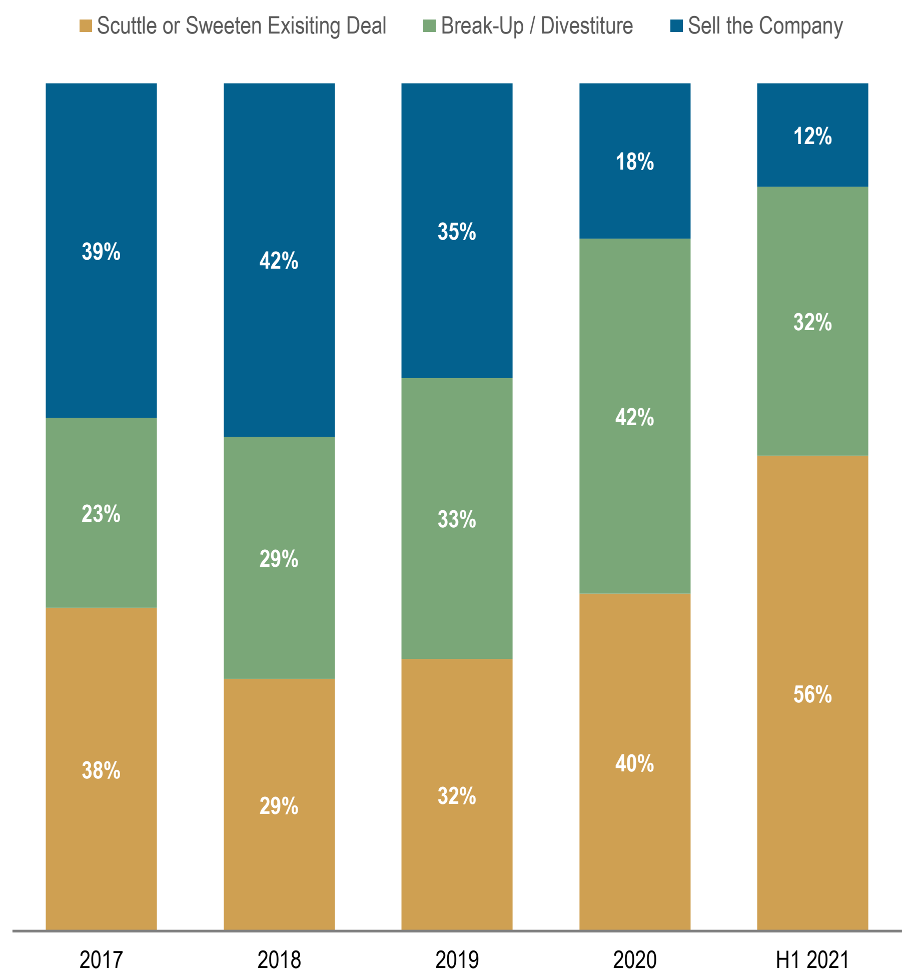
M&A Campaigns



H1 2021 Capital Deployed in M&A Campaigns by Sector



M&A Campaign Objectives by Type

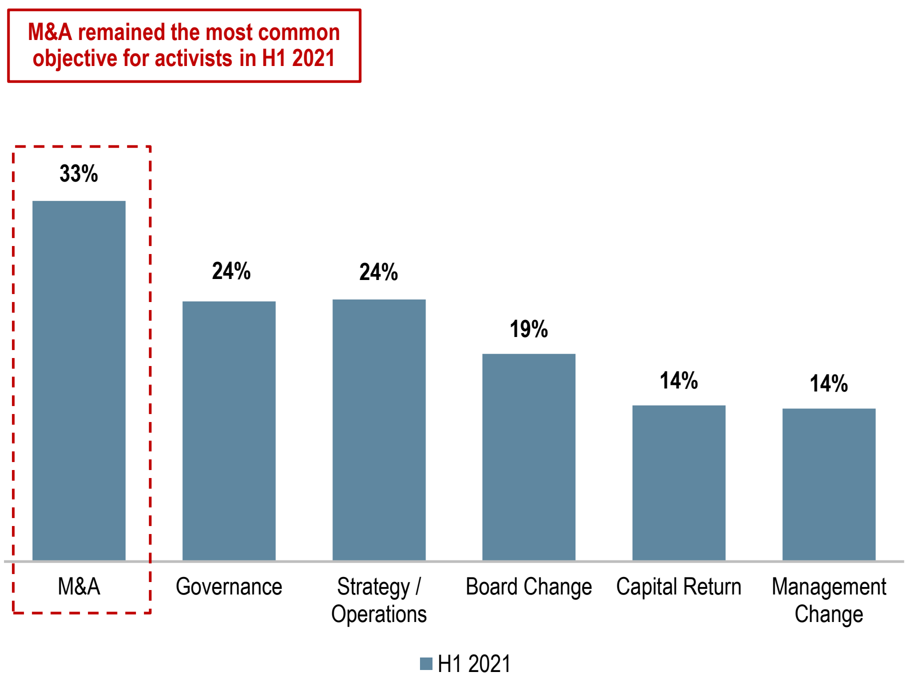


Source: FactSet, press reports and public filings as of 6/30/2021.

Europe: Increased Focus on M&A Thesis Related to Existing Deals

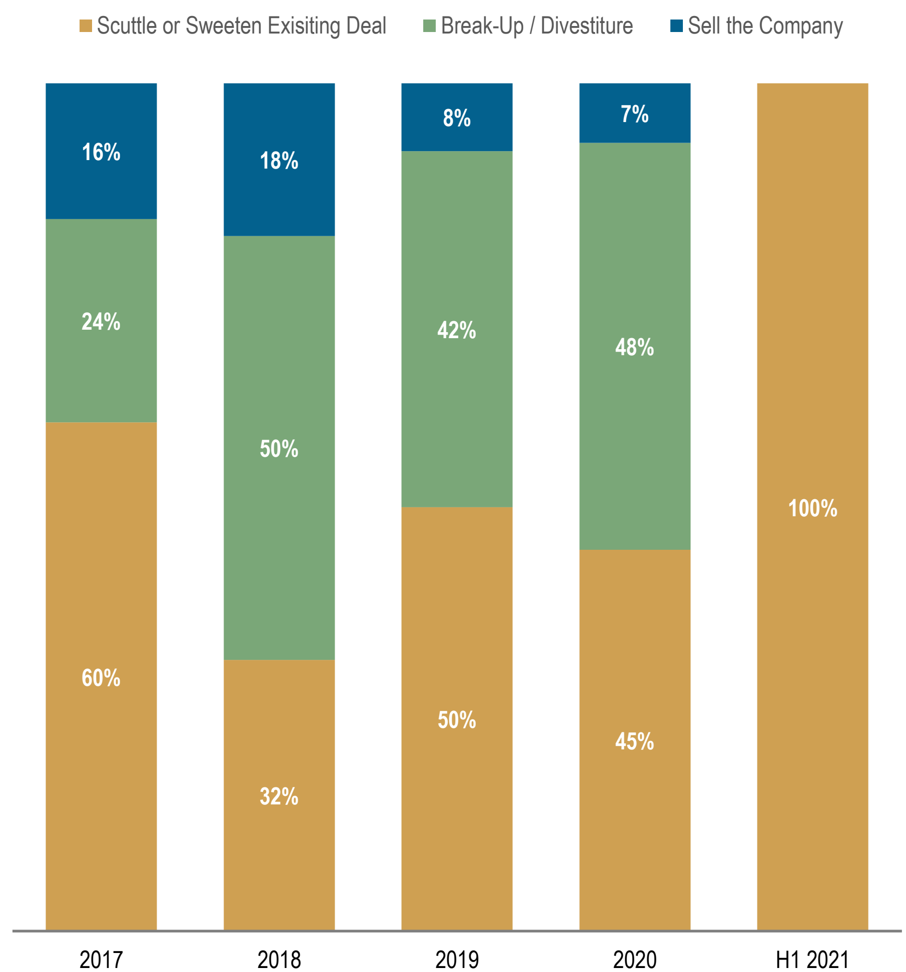
While M&A remained a prevalent campaign objective in Europe in H1 2021, the mix of M&A-related activism significantly shifted towards agitation around announced transactions

H1 2021 European Campaign Objectives



- **H1 2021 saw a downtick in the proportion of M&A-related activist campaigns—however, it remained the most common campaign objective in Europe**
- **100% of H1 2021 M&A campaigns were related to opposing deals and / or deals' conditions or price**
- **While the pandemic may have put a break on attacks against management teams and Boards, activists have intensified their criticism around governance issues as the market recovers**

European M&A Campaign Objectives by Type



LAZARD

Source: FactSet, press reports and public filings as of 6/30/2021.

The Activist Role in M&A in H1 2021

Sell the Company

Agitate for sale of target or encourage industry consolidation

12%

Target / Activist	M&A Thesis
4/21 Yelp / Eystra Capital	Eystra Capital published a presentation that recommended Yelp sell itself to Square, claiming that Yelp has underperformed with current management and the acquisition would help rebuild Yelp's business model and strategy
3/21 Columbia Property Trust / Arkhouse Partners, The Sapir Organization, 8F	After nominating six Directors to the Board, the activist group advanced a takeover offer to buy out Columbia for $19.50 per share; the group later withdrew all their candidates following Columbia announcing a planned strategic review
2/21 TreeHouse / JANA Partners LLC	JANA reported that it had engaged in discussions with the Board regarding capital allocation, operations, governance and a potential sale; a settlement was later reached and the activist was granted two Board seats

Break-Up / Divestiture

Agitate for a divestiture of a non-core business line or company breakup

32%

Target / Activist	M&A Thesis
4/21 Genesco / Legion Partners	Legion Partners nominated a seven-person slate for election; the slate was reduced to four with Legion claiming its nominees were prepared to start discussion about "eliminating Genesco's inefficient conglomerate structure [and] monetizing non-core assets"
2/21 Labcorp / JANA Partners LLC	JANA disclosed a stake and the media suggested that JANA was pushing for the spin-off of the Covance clinical research business; after reportedly nominating Directors, the Company launched a review and JANA withdrew its nominations
2/21 Blucora / Ancora	Ancora nominated four Directors to the Board and argued that the Company should rethink its strategy and sell its TaxAct tax business; all of Ancora's nominees failed to be elected at the April 2021 AGM

Scuttle or Sweeten Existing Deals

Entry into a live M&A situation to improve deal terms or block an ill-perceived deal from proceeding

56%

Target / Activist	M&A Thesis
5/21 CN / TCI Fund Management	TCI claimed Canadian National's merger with Kansas City Southern ("KCS") is "ill-advised and unnecessary" and criticized plans to create a voting trust to buy and own KCS while regulatory approval is pending, given the C$2bn investment necessary and regulatory risk
3/21 William Hill / hbk	HBK, the largest holder of William Hill, opposed the Company's merger with Caesars Entertainment, stating that shareholders were deprived of "information which would have allowed them to weigh up its true merits"; the merger was completed in April
2/21 CoreLogic / Pentwater Capital Management LP	Pentwater nominated its CEO to the Board, a move that the media reported was tied to disappointment in the Company's sale process; the Company shortly thereafter agreed to sell itself to private equity firms Stone Point Capital and Insight Partners; the acquisition closed in June

Source: *FactSet, press reports and public filings as of 6/30/2021.*

Updates to the ESG Landscape: Environmental Issues in Focus

Climate change-related regulatory developments—especially those related to mandatory disclosures and net-zero goals—represented a major focus of regulators and stakeholders in H1 2021

Climate Reporting Dominates U.S. Regulatory Agenda	• As the SEC looks to propose rules on mandatory climate-related disclosures as soon as October, the debate around the extent of disclosures is becoming more fraught as issuers worry about potential legal liabilities stemming from reporting – Reports that the SEC is looking to have climate disclosures furnished in standard corporate reports (e.g., 10-Ks) have led companies including Bank of America, Alphabet and Amazon to suggest that appropriate safe harbor provisions be introduced, or companies be allowed to disclose climate-related information outside of standard reports – Overall, there is broad agreement across issuers, investors and other stakeholders that any disclosures align with existing frameworks such as SASB and TCFD • In May 2021, the Biden administration signed an executive order for the government to further investigate climate-related financial risk – The order dovetails with the G7's decision to back mandatory climate reporting in line with TCFD • Treasury Secretary Janet Yellen appointed John Morton, a former Obama White House official, as the Treasury's "climate czar"
Focus on Climate and "Net Zero" Efforts	• The Biden administration has announced that the U.S. will cut its greenhouse gas emissions 50% by 2030 from 2005 levels, an acceleration of previous Obama-era goals • The same week, a coalition of ~160 financial firms representing assets of ~$70tn, announced the launch of the Glasgow Financial Alliance for Net Zero (GFANZ) – All members of GFANZ have committed to a net zero by 2050 target, using their investing and financing capabilities to achieve that target – GFANZ includes the Net Zero Asset Managers Initiative, which includes investors such as BlackRock, State Street, Vanguard and Wellington, representing ~$37tn in AUM overall • In June, the European Council set into legislation its objective for the EU to become climate neutral by 2050 – The law includes a binding net greenhouse gas emissions reduction target of 55% (vs. 1990 levels) by 2030 • These efforts come as corporate net zero pledges are receiving greater scrutiny as stakeholders assess the credibility of corporate roadmaps to achieving these goals
Further Steps to Disclosure Framework Consolidation	• In June, the Sustainability Accounting Standards Board (SASB) and International Integrated Reporting Council (IIRC) announced the completion of their merger to form the Value Reporting Foundation – The new organization will continue work with the IFRS Foundation as it formulates its Sustainability Standards Board

Source: FactSet, press reports and public filings.

U.S. ESG Equity Inflows Remain on Pace for a Record Year

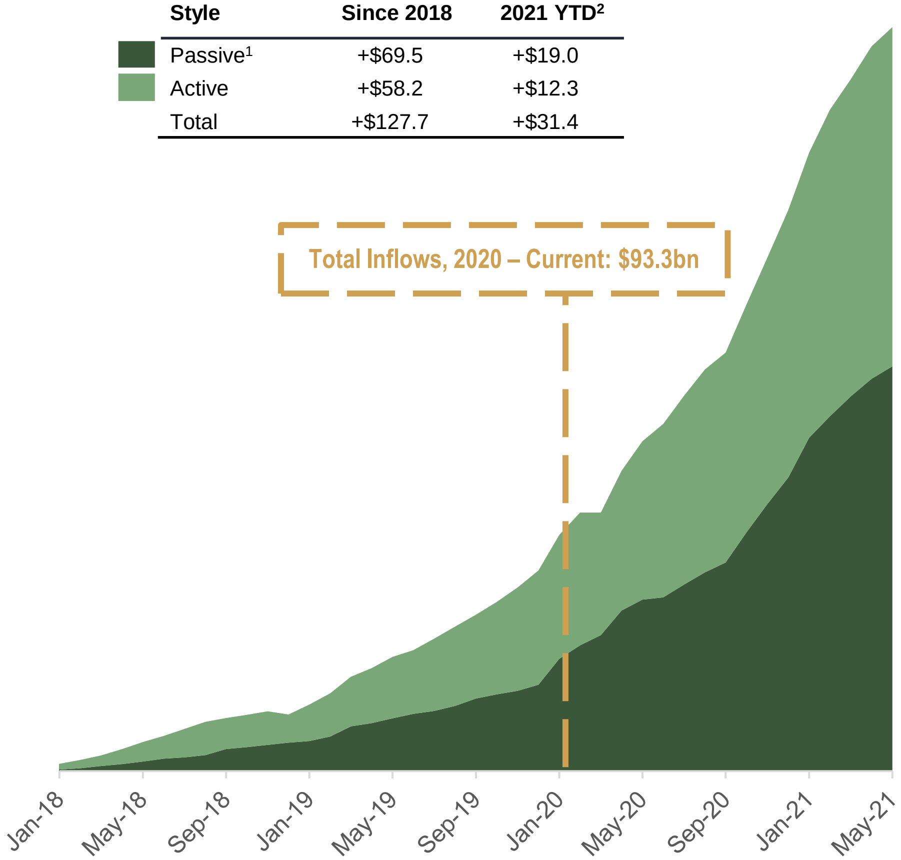
($ in billions)

Though the pace of inflows into ESG-related funds moderated slightly in April and May, 2021 inflows remain on pace to exceed 2020's record total

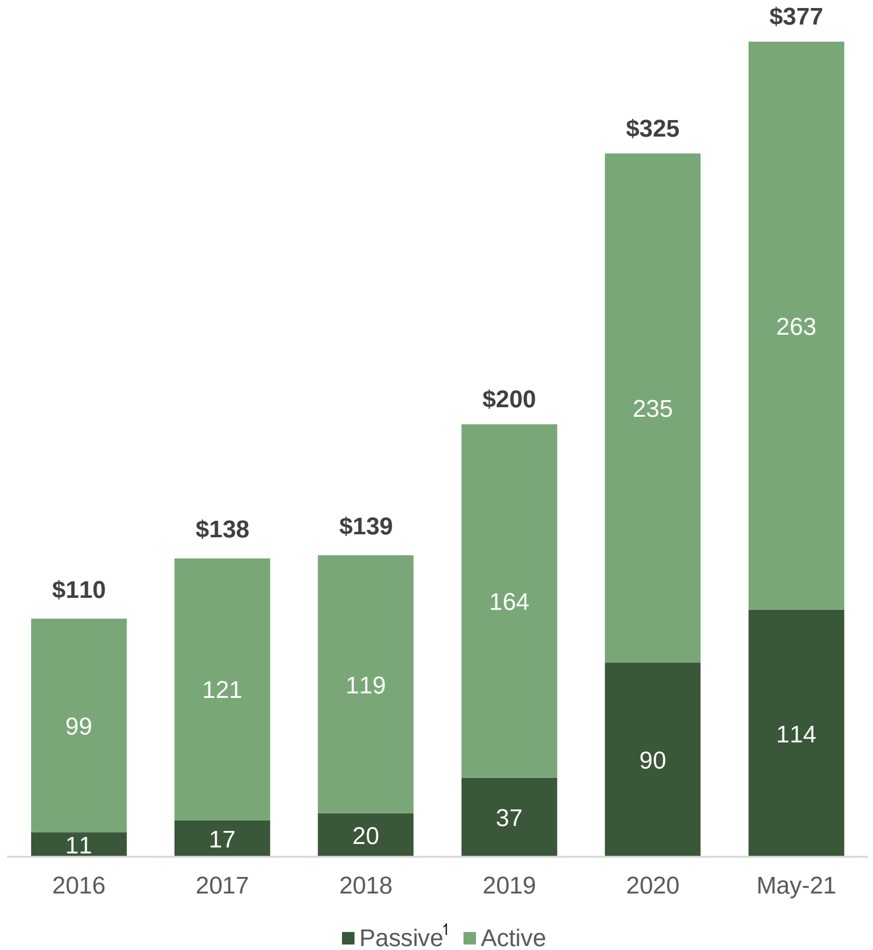
U.S. ESG Mandate Net Equity Fund Flows ($bn), 2018 – May 2021

Cumulative U.S. ESG Mandate Net Equity Fund Flows

Style	Since 2018	2021 YTD[2]
Passive[1]	+$69.5	+$19.0
Active	+$58.2	+$12.3
Total	+$127.7	+$31.4



U.S. ESG Mandate Equity Fund AUM ($bn), 2016 – May 2021

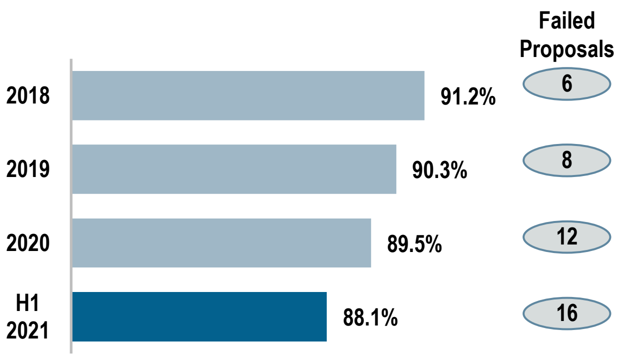


Source: *SimFund, press reports and public filings.*

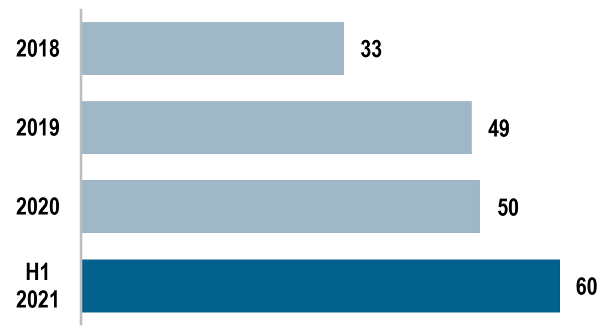
2021 Proxy Season: Investors Pressure U.S. Companies

2021 has seen the continuation of long-term trends around investor support for ESG issues, including a record number of E&S-related shareholder proposals receiving majority support

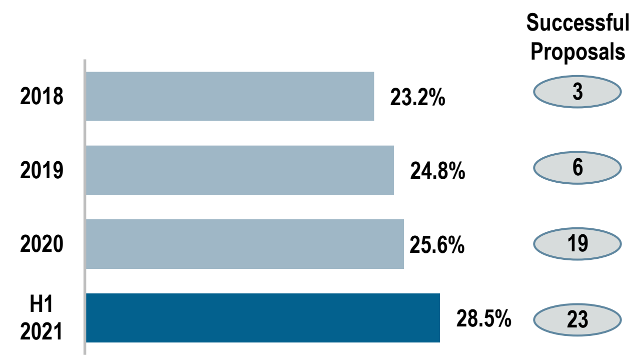
S&P 500 "Say-on-Pay" Support



Russell 3000 Directors Failing to Receive Majority Support



S&P 500 E&S Proposal Support



Notable "Say-on-Pay" Votes

- ~48% of shareholders voted in favor of Starbucks' compensation package
  - Proxy advisors recommended against the proposal, criticizing the rationale for a special performance award given the size of the award and that it had been the second consecutive year with such an award given

- Only ~17% of shareholders voted in favor of Norwegian's compensation package
  - Proxy advisors and investors noted that the Company had made changes to its annual and long-term incentive bonuses that increased total compensation for the CEO despite the effect of the pandemic on its operations

Notable Director Votes

- Paycom's two Directors up for election received support of ~35% and ~51%
  - ISS recommended against the Directors, citing supermajority vote requirements and a classified Board, as well as ongoing compensation concerns

- Stamps.com's two Directors up for election each failed to receive majority support
  - ISS recommended against the Directors, citing a lack of independence on the Board and failure to respond to a lack of majority support for Directors up for election in 2020

Notable Support for E&S Proposals

- ~61% of Chevron shareholders voted for a proposal requesting that Chevron "substantially" reduce its Scope 3 emissions in the medium and long term
  - BlackRock voted in support of the proposal, noting that the proposal was not overly prescriptive and its desire to see companies take further action to reduce Scope 3 emissions

- ~81% of DuPont shareholders voted for a proposal to have the Company issue an annual report on plastic pollution and an assessment of plastic contamination reduction efforts

Source: ISS Governance, public filings and press reports as of 6/30/2021.

Notable H1 2021 Say on Climate Proposals

Several prominent issuers, in particular across Europe, included "Say on Climate" advisory resolutions on their 2021 ballots; while the majority have come at the behest of shareholders, such as TCI, companies are also voluntarily adopting such proposals

Company	Voting Date	Frequency	% for Votes	Observations
VINCI	April 2021	n.a.	98%	• Transition plan to reduce direct greenhouse gas emissions by 40% by 2030, to take action to reduce emissions across the value chain and to improve company climate change resilience
GLENCORE	April 2021	n.a.	94%	• Transition to zero emissions by 2050 with reduction of 40% emissions by 2035
Nestlé	April 2021	n.a.	95%	• Transition to zero emissions by 2050 including 50% reduction by 2030 • Combined with ESG tie to executive compensation reinforcement
Moody's *	April 2021	Annual	99%	• First S&P 500 company to join Say on Climate initiative • Transition plan to carbon neutrality by 2050 • Combined with further incorporation of ESG in credit ratings
CN *	April 2021	Annual	92%	• Transition to zero emissions by 2050
ferrovial	April 2021	Annual	97%	• Transition to gas emission reduction plan as per the company's climate strategy report
Unilever	May 2021	Triennial	99%	• Transition to zero emissions from its own operations and 50% reduction of average product footprint by 2030, as well as zero emission from sourcing to point of sale by 2039
Shell	May 2021	Triennial	89%	• Transition plan to zero emissions by 2050 including 20% by 2030 and 45% by 2035
TOTAL	May 2021	n.a.	92%	• Transition plan to carbon neutrality and 2030 objectives • Combined with ESG tie to executive compensation reinforcement
S&P Global	May 2021	n.a.	100%	• Transition to net-zero by 2040 • 25% reduction in scope 1 and 2 GHG emissions from operations by 2025, 25% reduction in scope 3 GHG emissions from business travel by 2025
RioTinto	AGM 2022	n.a.	--	• Put to vote the TCFD-aligned reporting in order to disclose consistently with the evolving Climate Action 100+ group

Source: Company publications.

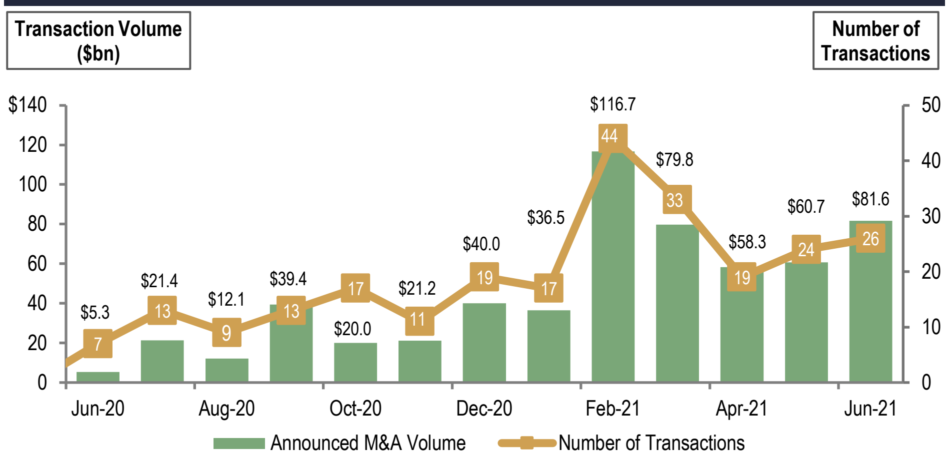
* Resolution filed by TCI

H1 2021 SPAC Business Combinations and Outstanding Volume

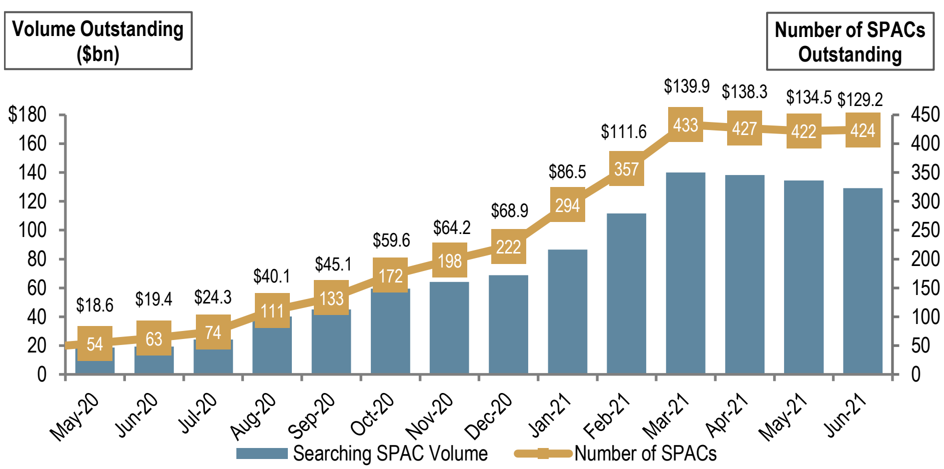
($ in billions)

The SPAC M&A market remains robust with 163 deals completed in H1 and 424 SPACs ($129bn of dry powder) still searching for targets; while activism has not yet surfaced at a de-SPACed company, several high-profile short campaigns have occurred since the start of the year

Monthly Announced SPAC Business Combination Volume



Searching SPAC Dry Powder Outstanding



Selected Recent Short Campaigns Against "De-SPACed" Companies[1]

Date	Campaign *(Short Seller)*	Stock Performance: 1 Day[2]	Stock Performance: Since Report[3]	Campaign Details
6/2021	DraftKings *(Hindenburg Research)*	(4.2%)	+3.1%	• Accused the Company of operating in illegal markets, including with organized criminal syndicates, and questioned the viability of the Company's large promotion and marketing budget
4/2021	danimer scientific A Biotechnology Company *(Spruce Point)*	(8.0%)	+0.2%	• Claimed management was engaged in unscrupulous behavior at previous companies, has a financial relationship with a lab the Company uses to support its efficacy and has provided inconsistent timelines and financial goals
3/2021	Lordstown *(Hindenburg Research)*	(16.5%)	(37.5%)	• Accused the Company of misleading investors about the capabilities of its electric pickup truck and making false statements regarding the number of pre-orders for the truck • In June, Lordstown's CEO and CFO resigned following announced inaccuracies around truck pre-orders
2/2021	Clover *(Hindenburg Research)*	(12.3%)	(4.5%)	• Criticized the Company for allegedly not disclosing to investors that it was under investigation by the DOJ into the business model and software offering • In June, Clover became the focus of retail traders on Reddit seeking to initiate a short squeeze

LAZARD

Source: SPACInsider as of 6/30/2021.

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SPACs: A New Frontier for Shareholder Activism

As SPACs spawn a new breed of newly public companies, activists are taking notice.

BY DEREK ZABA, KAI LIEKEFETT, AND JOSHUA DUCLOS

Much has been written about the torrent of activity in special purpose acquisition vehicles (SPACs) – a type of "blank check" company.

SPACs raise money in an initial public offering (IPO), which is placed in a trust account to be used for the sole purpose of identifying, acquiring, and merging with a private target company within 18 to 24 months. The culmination of this process is called a "de-SPAC," which is when the newly combined company becomes a publicly traded entity.

In the process, the formerly private company receives a public listing and a fresh infusion of cash from the SPAC's trust and/or a concurrent private investment in public equity offering (PIPE), and the SPAC's sponsor receives a hefty "promote" in the form of equity in the combined entity for putting up a modest amount of working capital funds and facilitating the transaction.

According to Bloomberg, 300 SPACs were launched in the first quarter of 2021 alone, which was more than the approximately 250 launched in 2020 (itself a banner year for SPAC launches that saw three times as many SPAC IPOs as 2019).

After the U.S. Securities and Exchange Commission (SEC) issued new guidance regarding the accounting rules to be applied to SPAC warrants, the pace of SPAC IPOs slowed to approximately 60 in the second quarter – driven largely by bottlenecks in the system created by the need for system-wide SPAC accounting restatements and investor worries regarding the SEC's increasing focus on SPACs in general.

Yet, this slower pace of SPAC IPOs remains elevated above historical levels. In addition, more than 400 SPAC vehicles now exist in the public markets that are still looking for acquisition targets. As a result, it is possible that within two years more than 10% of all public companies in the United States will have gone public through a de-SPAC.

SPACs Attract Activism

At the same time, the level of shareholder activism against public companies in general remains elevated relative to historical levels. In 2020, more than 400 activist campaigns were launched against public companies traded in a U.S. stock exchange.

Most of these campaigns were so-called "long activism" (agitating for change seeking to drive the stock up) and a minority were "short activism" (publicly criticizing the company or valuation in an attempt to drive the stock down). This is a continuation of a trend of increased activism that has grown throughout the boom in the markets since the financial crisis.

Due to increased competition within the asset class, and a decrease in the number of public companies in the United States during this time period, activists have been forced to look for targets beyond their traditional stomping grounds.

For example, until the past few years certain regulated industries such as insurance and utilities had largely been ignored by activists. Activism outside North America was also sporadic. As a result, the level of de-SPAC activity is effectively chum in the water for many hungry activists.

Nathan Anderson, Founder of Hindenberg Research, predicts, "[SPACs] taken public in 2020-2021 will be a key source of short ideas for the next decade."

SPACtivism Before the De-SPAC

The life cycle of a SPAC is well established. After a SPAC's IPO, it will spend 18 to 24 months on a search for a private company (standalone or, in some cases, a spin-off subsidiary of a public company) to acquire.

After selecting a target and agreeing to acquisition terms, the resulting transaction will require the approval of the shareholders of both the acquired company and the SPAC. Assuming shareholder approval is received, this de-SPAC transaction takes effect and the previously private company begins its life as a listed public company.

Activism is present at all stages of the SPAC life cycle, but the risk and nature of activism varies depending on the stage. The potential for activism increases immediately after the SPAC's IPO.

Before the time a target is found, an activist may attempt to influence the choice of the target. It is also possible that an activist may at the same time have a stake in a potential target company that they wish to be targeted by the SPAC.

The risk of this activism increases as the SPAC approaches its expiration, which has a punitive impact on the sponsor. As a result, the SPAC sponsor is likely to become more desperate and perhaps less discerning in evaluating acquisitions.

Activism risk continues after a target is selected during the de-SPAC process. Any time there is a shareholder vote on a substantial economic transaction, there is the potential for an investor to agitate against the deal.

In the late 2000s, there was a wave of activism against SPACs prior to a de-SPAC where activists would purchase shares of a SPAC at a discount with the intent of voting down any proposed merger and redeeming their shares for par value. While current SPAC structures have been modified to deter this specific type of activism, the risk of activism prior to a de-SPAC remains.

After the consummation of the de-SPAC, the risk of activism transfers to the newly formed public company.

SPACtivism After the De-SPAC

After the de-SPAC, the newly public company shares many characteristics with a company that recently completed a "regular" IPO. At its core, a de-SPAC is an alternative to a traditional IPO (and, increasingly, direct listings), in which a private company can transition into a public company. Generally, recent IPOs generally experience a "honeymoon" period that insulates them to some degree from both short activism and long activism.

On the short side, attacks immediately after an IPO are relatively uncommon. From a technical perspective the float of available shares of recent IPOs is often small and there are lockups in place for many insiders and pre-IPO investors to prevent them from selling shares during the first few months.

Less tangibly, there is also often a level of excitement in the wake of the IPO. However, as the lockups expire, insiders become allowed to (and do) sell down, and the float expands, the technical limitations on short-selling decrease, and the company becomes susceptible to short attacks.

On the long side, concentrated shareholder ownership through insiders and other pre-IPO investors, who also often maintain board representation, provides substantial protection against activism in the immediate wake of an IPO.

In some cases, with majority control, there is absolute protection against the threat of a proxy contest to change board composition, which is the ultimate weapon of the long activist. In addition, public institutional investors in an IPO have only recently and consciously chosen to purchase the stock because they support the company's board, management and strategy.

As a result, they are likely to give the company some time and breathing room to execute its strategy. Furthermore, from a tactical perspective, new IPOs have no public track record and stock price history for an activist to criticize.

All these factors reduce the risk of long activism shortly after an IPO. In fact, two years after an IPO the risk of long activism is only two-thirds that

Increased Activism Risk for Established Public Companies

The presence of so many SPAC vehicles may even have an impact on long activism at more tenured companies.

Activists often demand that a company pursue a spin-off or carve-out transaction. The availability of several hundred potential vehicles to facilitate such a transaction may result in more activists making this demand over the next two years.

This is particularly true as SPACs approach their expiration, and there is a perception that the SPAC sponsors are more desperate to strike a deal. In addition, several well-known shareholder activists have formed SPACs of their own.

It remains to be seen whether and how any of these SPACs may be used to facilitate the goals of the activist, such as in support of a separate activist campaign or perhaps with the goal of using the resulting de-SPAC as a permanent source of capital for future campaigns.

of a tenured public company, and it takes nearly five years of public trading to achieve equivalence.

In turn, many newly de-SPACed companies also expect to enjoy a honeymoon period similar to their traditional IPO peers. Given the similarity in purpose and result between an IPO and a SPAC merger, this is not surprising. Perhaps the greatest protection for both types of companies against a long activist is the significant insider and pre-IPO ownership in the immediate aftermath of going public, which often tends to be paired with board membership.

However, the pace at which immunity from activism fades is much faster for de-SPACed companies. This is due in part to certain aspects of the de-SPAC process, and in part to the nature of many of the companies that are increasingly going public through the de-SPAC process.

A SPAC conducts M&A due diligence on the private company it is looking to acquire, and – if there is a concurrent PIPE – the banks running that process and the institutional PIPE investors participating in it will add a second layer of vetting and validation to the transaction.

However, the de-SPAC process often still does not involve the same level of scrutiny and preparation by an underwriter that is present in an IPO (where an underwriting bank takes on statutory liability under the Securities Act of 1933), nor the same cache of credibility lent by using the name of that underwriter.

It is possible, therefore, that some companies that go public through a de-SPAC might not have survived the traditional vetting present in a traditional IPO. In addition, SEC regulations relating to a de-SPAC -- unlike those for an IPO -- provide a safe harbor for forward-looking statements, which permits financial projections to be used in marketing the deal. This is seen by many early-stage, high-growth companies as a major advantage to the de-SPAC process over the traditional IPO process.

As a result of these differences, certain companies may find themselves able to go public through a de-SPAC at a less mature stage, with a shorter track record and less public company readiness, and after marketing using forward-looking financial projections that look as many as five or more years into the future.

Furthermore, given the large number of SPACs that need to find partners for a de-SPAC in the next 18 to 24 months, there will be fierce competition to find quality private companies that are at the right stage in their evolution to become public. As a result, it is possible that certain SPACs may seek to partner with candidates that are less attractive than they otherwise would have, and which potentially have more weaknesses for activists to attack.

Finally, as a result of this increased activism risk, there is an additional risk of a sort of downward spiral, or self-fulfilling prophesy: if many activists believe there is a higher likelihood of finding an attractive activism target within this universe, then relatively more activists will look toward de-SPACed companies for potential campaigns, resulting in more activism overall and casting a further pall over those companies that access the public markets via this route.

How to Prepare for SPACctivism

As with many things, preparation for potential activism is key. An appropriate defense starts at the formation of the SPAC and continues into the de-SPAC transaction, and finally, with the resulting public operating company.

SPAC Formation and Target Identification

- **Assure Proper Board Composition for the De-SPAC Evaluation:** The SPAC board of directors should have a strong majority of directors who are truly independent of the sponsor. If it is necessary for several directors to have ties to the sponsor, consider using a special committee of independent directors to make recommendations regarding any de-SPAC. These actions protect against not only activism, but also the wave of litigation and SEC scrutiny that is beginning to crest and is typically focused on conflicts of interest between the sponsor and public SPAC shareholders.
- **Perform Extensive Due Diligence on Potential Targets:** SPACs have historically varied widely in the extent of diligence they perform on their potential target companies. It is imperative, however, for a SPAC to approach the de-SPAC as a full-scale acquisition and, as such, perform the same degree of diligence as a strategic or private equity buyer. This diligence will lead to the better choice of targets, afford the ability to correct any issues identified in the process, and give the SPAC the information it needs to properly help the target company prepare to be a public company.

De-SPAC Merger

- **Assure Proper Board Composition and Management Team Preparedness:** Operating in the public sphere is drastically different than operating as a private company. Everything from day-to-day operations to operational planning, budgeting and forecasting is different when you have thousands of owners (ranging from hedge funds and large institutional investors to retail traders) rather than a handful of venture capital or private equity firms. Public companies are subject to SEC reporting requirements and the scrutiny of analysts, investors and plaintiffs' attorneys. The c-suite and the board room should therefore be composed of a diverse and qualified array of experts with public company experience while also maintaining the key talent and leadership required to execute on the strategy.
- **Include Achievable Forecasts:** Understand that optimistic projections provided in conjunction with the merger may be used against a newly public company by activists if they are not achieved. More modest projections may put some pressure on immediate valuation, but will position the de-SPACed company better to meet projections going forward, rather than missing out of the gate. In addition, consider whether the benefit of longer-term forecasts (which are likely to be discounted by potential investors) are worth the potential future consequences of not achieving these forecasts.
- **Adopt Governance That Protects Against Activism:** Consider protective structures such as classified boards and prohibitions on shareholders calling special meetings or acting by written consent. In addition, any standard form charters and bylaws used by newly minted public companies do not typically include more nuanced protections against shareholder activism. Ensure that these documents have been reviewed by experienced activism counsel.

> Not long after the SPAC merger, a company will be held to increasingly higher standards on board and governance practices, eventually in line with more tenured public companies.

Post De-SPAC

- **Break-the-Glass Plan:** In the event of a public attack, it is crucial for the company to be prepared to respond in the same news cycle, if necessary. It should include draft "shelf" response press releases as well as a process flow for real-time decision-making and coordination with external advisors. There is no such thing as too early, and this should ideally be developed as part of the public-company readiness efforts during the de-SPAC process.
- **Board and Management Education/Tabletop Exercise:** Educate the board of directors and broader management team on the activism environment and current risk level. Hold mock sessions on a potential activist attack with senior management and/or the board to educate them on how these campaigns unfold.
- **Look for Early Warnings Signs:** Keep an eye out for unusual activity in theshareholder base – it is not uncommon for long activists to acquire toe-hold positions before approaching their targets. In addition, both long and short activists tend to reach out to former employees in an attempt to gather information. Be prepared and coach your teams ahead of time on reporting these communications up the chain and have a boilerplate response plan in advance.
- **Regularly Review Governance Practices:** Not long after the SPAC merger, a company will be held to increasingly higher standards on board and governance practices, eventually in line with more tenured public companies. In addition, consider updating governing documents to update protections against quickly evolving activist tactics. IR

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AN FTI CONSULTING REPORT – PUBLISHED 09/09/2021

The Activism Vulnerability Report

Q2 2021

Introduction

As we enter the "dog-days" of summer, FTI Consulting's Activism and M&A Solutions team warmly welcomes our clients, friends and readers to our seventh quarterly Activism Vulnerability Report, documenting the results of our Activism Vulnerability Screener following the second quarter of 2021, as well as other notable trends and themes in the world of shareholder activism and engagement. When we published our last report in May, we hoped it would be the final chapter in our (unofficially titled) five-part "COVID-19" series. However, with the recent surge in the more transmissible Delta variant, it appears that our pandemic series will continue, at least in the near term. As we enter the next chapter of pandemic life, we hope you and your families remain safe and healthy.

Market Update

The more things change, the more they stay the same. Although COVID-19 remained a global concern, U.S. equity markets continued to push higher in Q2 2021. For the year, the S&P 500 Index is up 18.3%, while the Dow Jones Industrial Average has returned 14.7% and the Nasdaq Composite Index has returned 14.2%.[1]

Year-to-Date Performance (2021)[2]

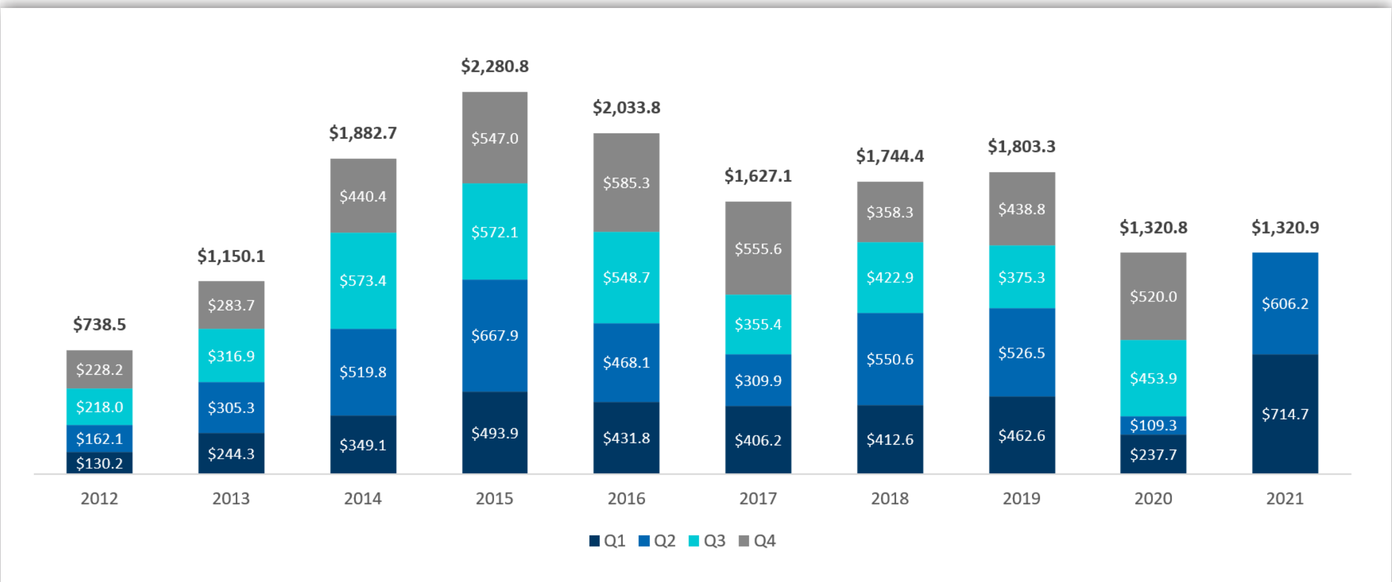
While value stocks outperformed growth stocks in the Q1 2021, that style rotation appears to have been short-lived, and the longer-term trend of growth stock outperformance has continued so far in 2021. Year-to-Date, the S&P 500 Growth Index has returned 20.6% compared to the S&P 500 Value Index, which has returned 17.9%.[3]

[1] FactSet, Market Data as of August 20, 2021; FTI Analysis
[2] FactSet, Market Data as of August 20, 2021; FTI Analysis
[3] FactSet, Market Data as of August 20, 2021; FTI Analysis

For the second quarter of 2021, equity markets were in part driven by another strong corporate earnings season. While above-average growth rates are in part due to an easier comparison to weaker earnings from Q2 2020, quarterly profits are also expected to surpass their 2019 levels.[4] The strength of both the equity market and corporate earnings came despite headwinds including the Delta variant, rising inflation concerns and Beijing's recent regulatory crackdown on the technology industry.[5]

It was also another strong quarter (and half) for corporate M&A and private equity LBOs, both globally and domestically. Globally, H1 2021 set a record high for M&A deals greater than $2 billion, with 143 such deals recorded in Q2 2021 and 161 such deals recorded in Q1 2021. For U.S. companies specifically, over $1.3 trillion was spent on M&A during the first six months of the year – the highest amount in the past 10 years.[6] A portion of U.S. M&A activity was driven by a first-half boom in SPAC transactions; through June 2021, 176 SPAC transactions worth more than $386 billion had been completed.[7] Bill Ackman's attempted SPAC transaction (Pershing Square Tontine Holdings' acquisition of a minority stake in Universal Music Group) was one of the more prominent and high profile deals of the year before the deal was challenged in a lawsuit by a group including former U.S. Securities and Exchange Commissioner Robert Jackson. The lawsuit challenges the fundamental structure of a SPAC and its current regulatory status as an operating company; if successful, the lawsuit may reform the entire SPAC industry.[8]

U.S. Quarterly M&A Volume by Value ($ in bn)[9]



It was also a strong quarter (and half) for private equity globally, with H1 2021 representing the strongest half-year on record with a total buyout value of $489.9 billion across 1,107 deals. For the U.S. specifically, leveraged buyouts represented over 10% of all U.S. acquisitions, by deal count, worth approximately $162.1 billion.[10]

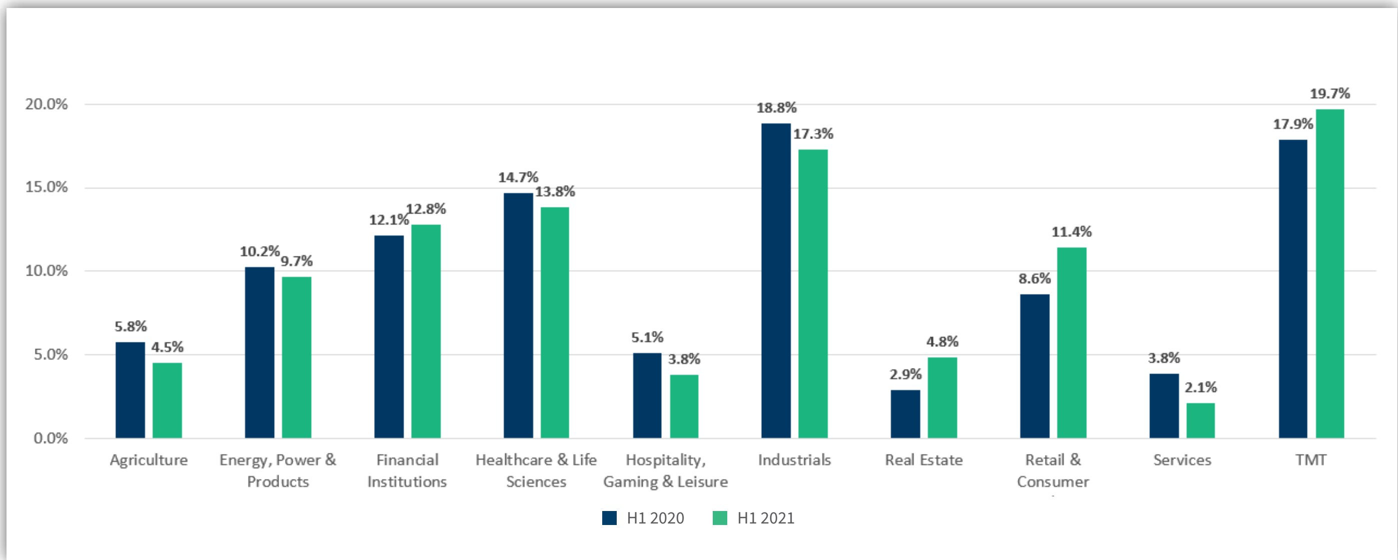
4 https://www.wsj.com/articles/record-pace-for-corporate-earnings-keeps-stocks-buoyant-11628415002?mod=searchresults_pos6&page=1
5 https://www.ft.com/content/7e6f9a08-37be-4ab3-ae15-953533ab33b5
6 FactSet, Market Data as of August 20, 2021; FTI Analysis
7 https://www.nytimes.com/2021/08/17/business/dealbook/bill-ackman-spac.html
8 https://www.nytimes.com/2021/08/17/business/dealbook/bill-ackman-spac.html
9 https://www.ft.com/content/7e6f9a08-37be-4ab3-ae15-953533ab33b5
10 Cravath Quarterly Review: M&A, Activism and Corporate Governance (Q2 2021)

Activism Update

While global and domestic M&A activity is often a bellwether for shareholder activism, the activist investment strategy did not receive a commensurate uptick in activity in Q2 2021 or H1 2021. The second quarter of 2021 represented the fewest number of U.S. activist targets (133) since Q2 2015; Q2 2021 activist targets were down 18% compared to Q2 2020, when there were 167 U.S. activist targets.[11] Moreover, the first half of 2021 represented the fewest number of U.S. activist targets (302) since H1 2015; H1 2021 activist targets were down 13% compared to H1 2020, when there were 341 U.S. activist targets. [12] While broader activist activity remained muted through H1 2021, Elliott Management returned prominently to the market in Q2 2021, launching five campaigns globally – and two of which were in the U.S.[13]

Through the first half of 2021, the Technology, Media and Telecom ("TMT") sector was the sector most frequently targeted by activist investors, with TMT companies accounting for nearly one out of every five activist campaigns. The Industrials sector was the second most frequently targeted, followed by the Healthcare & Life Sciences sector. These three sectors were also the most frequently targeted in the first half of 2020, representing a continuity of focus (or comfort level) by the activist investing community. On the other hand, the Services and Real Estate sectors have been the least targeted by activist investors during the first half of both 2020 and 2021.[14]

Activist Targets by Sector (% of All U.S. Activist Targets)



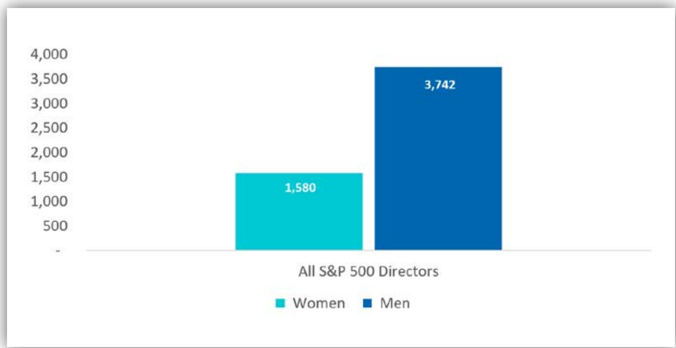
As a result of the diminished activism campaign activity through H1 2021, activist investors have gained the fewest number of board seats through the first six months of the year over the past four years. Board seats gained by activists in the U.S. are down 15% when compared to H1 2020 and down over 53% when compared to H1 2018, the recent highwater mark.[15]

Despite fewer board seats being won by activists, the broader corporate governance and public company director landscape continued to shift in H1 2021. Through mid-June, S&P 500 companies tripled the share of newly appointed directors who are Black and more than doubled the share who are Latino. Despite positive trends in ethnic diversity on corporate boards, gender diversity appears to have regressed slightly, with women accounting for just 43% of new board members in 2021, down from 47% in 2020.[16] However, even with the seemingly meaningful shift, U.S. corporate boards remain in the early innings of improving gender and ethnic diversity, a trend which we expect will continue to gain momentum in the new decade.

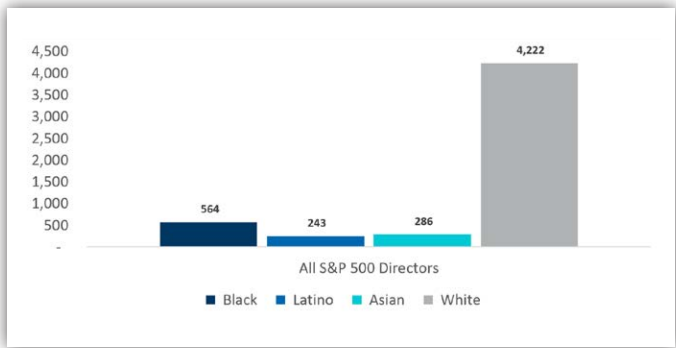
[11] https://www.activistinsight.com/research/Insightia_H12021.pdf
[12] https://www.activistinsight.com/research/Insightia_H12021.pdf
[13] https://www.lazard.com/media/451731/lazards-h1-2021-review-of-shareholder-activism-vff.pdf
[14] https://www.activistinsight.com/research/Insightia_H12021.pdf
[15] https://www.activistinsight.com/research/Insightia_H12021.pdf
[16] https://www.wsj.com/articles/this-years-influx-of-directors-starts-shift-in-boardroom-diversity-11623835801

Share of All S&P 500 Directors by Race, Ethnicity and Gender (2021)[17]

Share of All S&P 500 Directors by Gender (2021)



Share of All S&P 500 Directors by Race and Ethnicity (2021)



The increased momentum toward diversifying U.S. corporate boards is a result of both investor sentiment and new regulations. In August, Nasdaq's board-diversity proposal surprisingly gained approval from the Securities and Exchange Commission ("SEC"); Nasdaq will now require its companies to meet certain minimum targets for the gender and ethnic diversity of their boards or provide disclosure for why they do not.[18]

The other regulatory change that likely will continue to be a focal point for both activist investors and companies are proposed amendments and changes to SEC's oversight of proxy statement rules. Proposed amendments include "requiring the use of universal proxy cards in all non-exempt director election contests, revising the consent required of a bona fide director nominee and eliminating the short slate rule.[19] Sidley Austin described the rule changes as "Proxy Access on Steroids," while Elliott Management said that the amendments would "enhance the proxy system."[20, 21]

[17] https://www.wsj.com/articles/this-years-influx-of-directors-starts-shift-in-boardroom-diversity-11623835801
[18] https://www.wsj.com/articles/nasdaqs-board-diversity-proposal-faces-sec-decision-11628242202
[19] Activist Insight; *Planned universal proxy changes draw mixed reaction*
[20] https://www.sidley.com/-/media/update-pdfs/2021/06/20210608shareholderactivismupdate.pdf?la=en
[21] https://www.sec.gov/comments/s7-24-16/s72416-8883055-240420.pdf

Q2 2021's Most Vulnerable Industries

The table below shows the Total Vulnerability Scores for the 36 industries:

Rank	▲ Rank QoQ	FTI Industry	Q2 2021 Vulnerability Score	Q1 2021 Vulnerability Score
1	▲ 1	Aviation & Airlines	60.3	58.5
2	▲ 5	Media & Publishing	59.7	55.4
3	▼ 2	Utilities	58.4	59.5
4	–	Power	57.9	57.0
5	–	Biotechnology	56.1	56.0
6	▲ 11	Regional Banks	55.4	53.2
7	▲ 11	Automotive	55.3	51.9
8	▼ 5	Savings Banks	54.9	57.8
9	▲ 5	Energy	54.7	53.7
10	▲ 3	Aerospace and Defense	54.3	53.9
11	▼ 2	Telecommunications	54.2	54.6
12	▼ 4	Hospitality & Gaming	54.2	54.7
13	▼ 1	Insurance	53.2	54.1
14	▲ 2	Restaurants	53.2	53.3
15	▼ 5	REITs	53.0	54.5
16	▼ 5	Pharmaceuticals	52.9	54.3
17	▲ 5	Healthcare Services	52.4	50.9
18	▲ 3	Agriculture & Chemical Products	52.3	51.3
19	▲ 7	Consumer Finance	52.1	48.9
20	▼ 14	Real Estate	52.0	55.4
21	▼ 2	Consumer Non-Durables	51.9	51.5
22	▲ 1	Transportation	51.0	49.6
23	▼ 8	Financial Conglomerates	50.8	53.6
24	▲ 6	Chemicals	50.6	47.6
25	▼ 5	Business Services	50.5	51.5
26	▲ 1	Industrial Distributors	49.8	48.5
27	▼ 2	Construction	49.5	49.1
28	▼ 4	Professional Services	49.4	49.3
29	▲ 3	Banks	47.7	46.6
30	▲ 3	Consumer Durables	47.4	46.3
31	▼ 2	Industrial Equipment	47.3	47.7
32	▼ 4	Technology-Software	46.0	47.8
33	▲ 1	Investment Managers	45.4	46.0
34	▼ 3	Life Sciences	44.6	46.8
35	▲ 1	Mining	44.1	41.7
36	▼ 1	Technology-Hardware	42.9	43.2

For the first time since the Q3 2020 report, the Utilities sector is not the most vulnerable sector to shareholder activism, as defined by FTI's Activism Vulnerability Screener. Both the Aviation & Airlines sector and the Media & Publishing sector have overtaken the Utilities sector in terms of total vulnerability to shareholder activism. The Aviation & Airlines sector faces continued COVID-19 challenges, as business travel remains depressed when compared to pre-pandemic levels; the near-term future for both business and personal travel remains murky due to the surging Delta variant.

The Regional Banks and Automotive sectors were the largest movers up the vulnerability rankings, each moving up eleven spots. The Real Estate sector, on the other hand, was the largest downward mover in the vulnerability rankings, moving lower by fourteen spots. The S&P Real Estate Select Sector Index is the top performing sector index year-to-date after a challenging 2020 in which it was the second worst performing sector index. The Real Estate sector was particularly stalled by COVID-19 and the ensuing stay-at-home orders but has rebounded as vaccination rates increase and both corporations and citizens return to normalcy.

FTI Observations and Insights

SEC Regulatory Update: Form 13-F

In an effort to increase the transparency behind investor movements, in late July, the U.S. House Financial Services Committee voted to advance a bill that would provide more frequent insights into investor positions, while providing disclosures for short-seller movements. The Short Sale Transparency and Market Fairness Act would require investors with at least $100 million of equity investment discretion to file their holdings via SEC Form 13F within 10 days of the end of the previous month (versus the current SEC rules that stipulate that these investors have 45 days from the end of a calendar quarter).[22] *These more frequent filings would include both equity positions and direct or indirect derivative positions, such as security-based swaps. Furthermore, within 180 days after the enactment of the bill, the SEC will issue rules implementing disclosure on short sales, which is an amendment related to the Dodd-Frank Act, and not later than one year after the enactment of the bill the SEC will submit a study on the confidential treatment of Form 13F reports.*[23]

This new bill is a dramatic turnaround from the prior administration's agenda, which in July of 2020 had proposed increasing the Form 13F threshold for equity investment discretion to $3.5 billion.[24] *Passage of this new bill would create a major blockade to the techniques used by the shareholder activist community. Activist investors typically use different types of derivatives investments, such as over-the-counter options and swaps, in order to "fly under the radar" while having economic exposure to their investment. In practice, while the investor may hold the benefit of the price appreciation, the counterparty to the derivative position will file the ownership information with the SEC. Should passage of this bill come to fruition, the public will know which of these activist investors has exposure to certain equities in a timelier fashion.*

It would be naïve to think that passage of this bill will cut back on shareholder activism. While the tactics of these investors would become public in a more frequent manner, the speed at which these investments are accumulated by the activist may be accelerated. Accurate and timely knowledge of the hedge fund movements inside the shareholder base will be of utmost importance in order for the public entity to keep its "first mover advantage."

– David Farkas, Managing Director, Activism and M&A Solutions

[22] https://financialservices.house.gov/uploadedfiles/bills-1174618ih.pdf
[23] https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf
[24] https://www.sec.gov/news/press-release/2020-152

2021 Proxy Season Update and Review

ESG campaigns received significant publicity this proxy season, in part due to a successful proxy campaign incorporating an ESG theme against supermajor oil company, ExxonMobil. Environmental proposals themselves have received stronger support from investors in 2021. Average shareholder support for shareholder-sponsored environmental proposals at U.S. companies was 45% through June 18, 2021, a noteworthy increase from 33% in FY2020. Twelve shareholder environmental proposals passed by that date this year, far more than by that date in any of the previous three years. BlackRock (75.0%) and Vanguard (66.7%) each have supported a much higher percentage of environmental proposals this year than in prior years. Their vocal support of such measures may spur other money managers to more frequently support environmental proposals in future years.

This year's successful shareholder environmental proposals often targeted America's largest companies. Shareholders of Chevron approved a resolution asking it to substantially reduce the greenhouse gas emissions of its energy products in the medium to long-term. United Airlines' shareholders agreed that the company should issue a report describing if, and how, its lobbying activities (including through trade groups) align with the Paris Climate Agreement. DuPont de Nemours' shareholders voted that the company should issue an annual report about the amount of plastic in various forms released by the company.[25]

Support for shareholder-sponsored social proposals also grew, although at a slower rate than support for environmental proposals. Such proposals at U.S. companies have received average shareholder support of 31% so far in 2021, a modest increase over the previous three years, when average support ranged between 24% and 29%. Five shareholder-initiated social proposals passed by June 18, 2021, in line with 2020's results. As with environmental proposals, BlackRock and Vanguard also gave much more support to social proposals, from less than 25% in 2020 to 75% in 2021 for each firm.[26] *Given the prominence of such issues since Spring 2020 and increased support from two typically large shareholders, it seems surprising that social proposals have not attracted more support so far in 2021.*

– Kurt Moeller, Managing Director, and Robert Kueppers, Senior Advisor; Activism and M&A Solutions

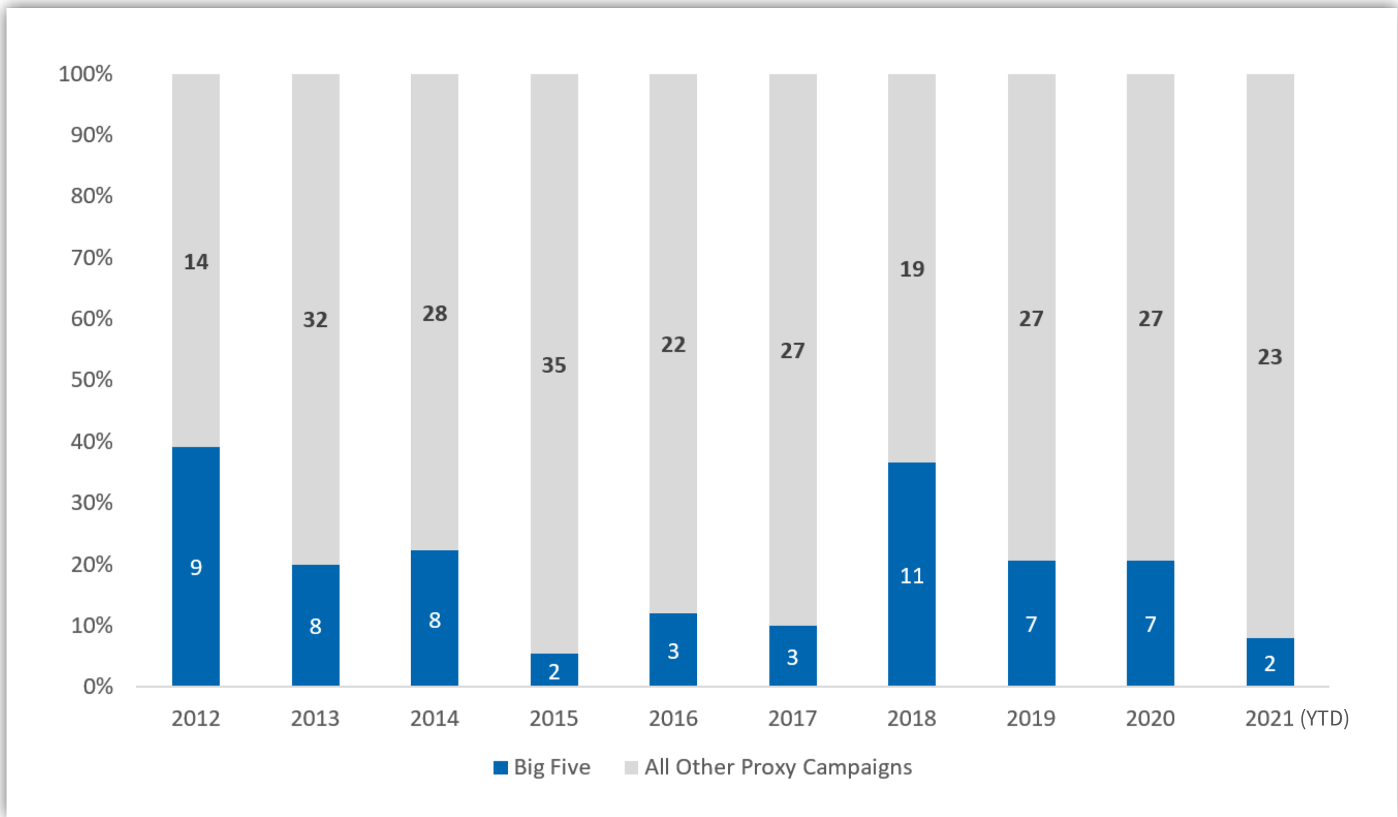
What This Means

Through the early part of the last decade, brand-name shareholder activists grew to be highly influential in both the investing and financial media communities. As their investment strategies rose to prominence, activist investors gained reputational credibility, media notoriety, a following from "permanent" investors and, most importantly, capital commitments. The most prominent activist funds were not only influential investors, but also savvy media strategists. As proxy campaigns captured the focus of investing media, many activist investment funds gained recognition, but five funds became particularly prominent: Elliott Management, Icahn Associates, Pershing Square Capital Management, Starboard Value and Third Point Partners. These funds not only launched a number of proxy campaigns but were notably successful in doing so.

At their peak in 2012, these five funds represented 39% of all proxy campaigns.[27] Thus far in 2021, these five funds have launched only two campaigns. In recent years Starboard Value (a combined 16 campaigns between 2018 and 2020) has remained quite active in this area, but several other prominent funds have taken a less public and/or hostile approach. At least for now.

[25] Insightia – Proxy Insight; Data as of August 20, 2021
[26] https://www.activistinsight.com/wp-content/uploads/dlm_uploads/2021/06/Insightia_ESG21.pdf
[27] FactSet, Market Data as of August 20, 2021; FTI Analysis

“Big 5” Activists as a % of Total Proxy Campaigns

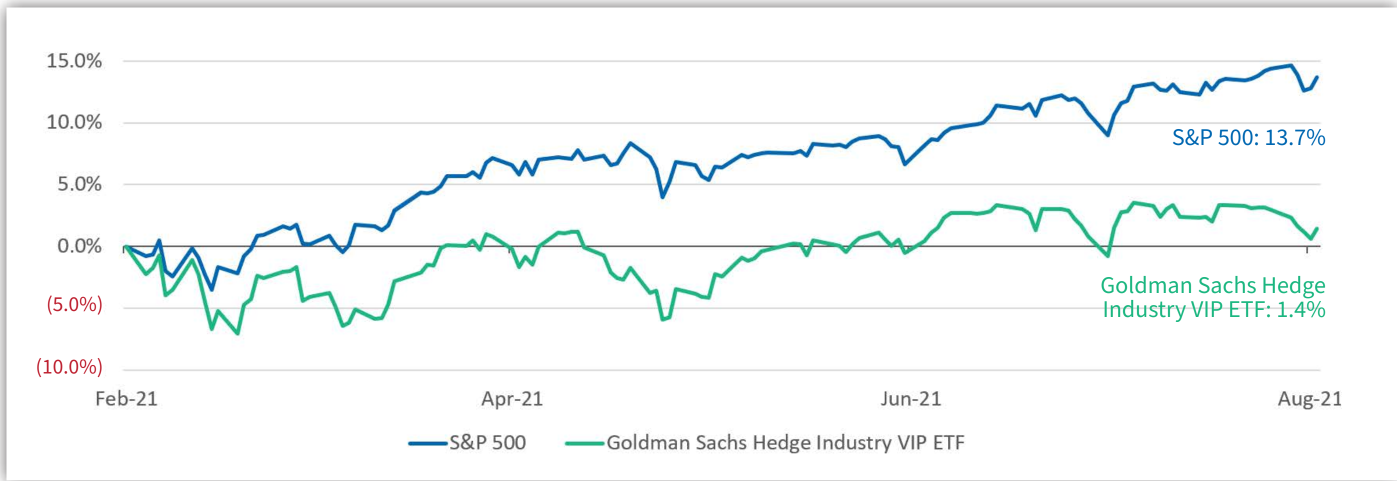


Despite the “Big Five’s” shift away from waging proxy campaigns this year, the absolute number of annual campaigns has averaged 31 over the past five years. This suggests both that smaller activist funds are launching campaigns at an increasing pace and that there are new entrants to the shareholder activism strategy, including both first-time hedge funds and non-activist, institutional managers. The activism strategy is entering a new stage of its evolution from corporate raiders of the 1980s to the media-focused, proxy campaigns of the 2010s to its current state, where operational and strategic activism has fused with corporate governance and ESG. Funds like Engine No. 1 have recently proven that to be successful in a proxy campaign, a fund no longer needs a proven pedigree of prior campaigns, nor a major asset base.

While the broader universe of equity-focused hedge funds has performed quite well, relatively, in the first half of 2021, this group of funds underperformed the benchmark market (the S&P 500 Index) through the same period. One reason for the underperformance of the asset class was the underperformance of its favorite stocks. Over the past six months, the Goldman Sachs Hedge Industry VIP ETF, which takes into account the most heavily owned shares by U.S. hedge funds, has significantly underperformed the S&P 500 Index, returning just 1.4% over the six month time period, compared to returns of 13.7% for the Index.[28]

[28] FactSet; FTI Analysis; https://www.nytimes.com/2021/08/24/business/dealbook/pfizer-fda-covid-vaccine-mandates.html

Hedge Fund's Favorite Stocks Have Recently Underperformed (Trailing 6 Months)



Given the wide-ranging underperformance of the U.S. hedge fund managers' highest-conviction stocks, we suspect a number of fund managers have begun contemplating how they would improve one, or more, of their holdings' operational performance, how they would improve its capital allocation strategy or how they would improve its corporate governance. Taking it a step further, we suspect some of these managers have likely voiced their concerns and suggestions to management and, pending management's receptivity, have contemplated voicing their concerns publicly. In a fee-sensitive world, where fund managers are often only as good as their most recent returns, we suspect many managers are feeling the pressure to take an active role in improving the performance of their key holdings. In the second half of 2021 and beyond, we think that the environment is favorably positioned for both occasional and first-time activists to represent a driving force in shareholder activism and the number of proxy campaigns.

FTI's Activism Vulnerability Screener Methodology

- The Activism Vulnerability Screener is a proprietary model that measures the vulnerability of public companies in the U.S. and Canada to shareholder activism by collecting criteria relevant to activist investors and benchmarking to sector peers.
- The criteria are sorted into four categories, scored on a scale of 0-25, (1) Governance, (2) Total Shareholder Return, (3) Balance Sheet and (4) Operating Performance, which are aggregated to a final Composite Vulnerability Score, scored on a scale of 0-100.
  - By classifying the relevant attributes and performance metrics into broader categories, experts at FTI can quickly uncover where vulnerabilities are found, allowing for a more targeted response. FTI's Activism and M&A Solutions team determined these criteria through research of historical activist campaigns in order to locate themes and characteristics frequently targeted by activist investors.

— The following is a selection of themes that are included for each category:

Governance

— Proxy voting standard
— Board composition
— Proxy access

Total Shareholder Return

— Capital gains
— Dividend and share repurchase policy
— Relative valuation

Balance Sheet

— Capital allocation
— Leverage ratios
— Liquidity

Operating Performance

— Revenue and earnings growth
— Profitability margins
— Merger integration

— The Activism and M&A Solutions team closely follows the latest trends and developments in the world of shareholder activism. Due to the constantly evolving activism landscape, FTI's Activism and M&A Solutions team consistently reviews the criteria and their respective weightings to ensure the utmost accuracy and efficacy of Activism Screener.

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LAZARD'S CAPITAL MARKETS ADVISORY GROUP

Review of Shareholder Activism — Q3 2021

Observations on the Global Activism Environment in Q3 2021

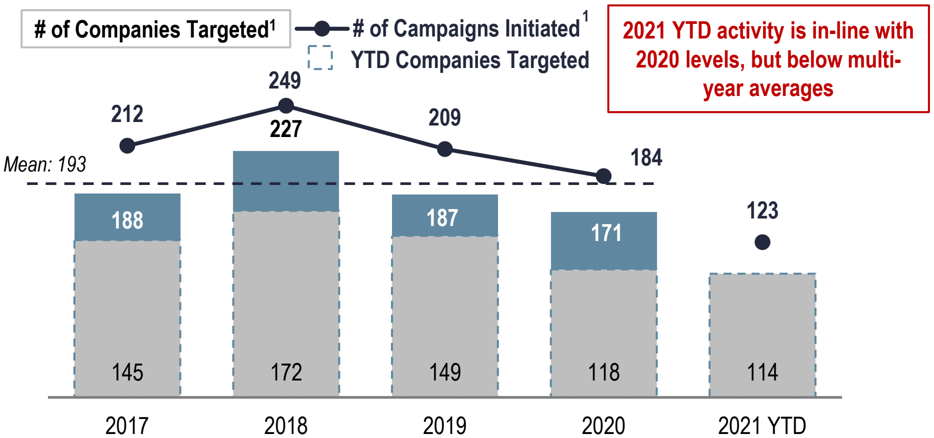
1 U.S. Activity Leads Global Market in 2021 YTD	• 123 new campaigns have been initiated globally in 2021 YTD, in line with 2020 levels but below historical averages – Year-over-year stability primarily driven by a strong start to the year, with Q3 new campaigns launched (29) and capital deployed ($8.5bn) below multi-year averages • U.S. share of YTD global activity (54% of all campaigns) remains elevated relative to 2020 levels (45% of all campaigns) and in-line with historical levels – The 66 U.S. campaigns initiated in 2021 YTD represent a 27% increase over the prior-year period • After a slow start to the year, Elliott remains the most prolific activist in terms of launched campaigns (12), with six new global campaigns reported in Q3, including Citrix, Toshiba and SSE • While YTD 2021 activity in Europe has slowed after a record-setting end to 2020, Q3 campaigns (13) represent a slight uptick from Q1 and Q2 levels – The U.K. is sharply in activist cross-hairs, representing 41% of European campaigns compared to 35% historically and attracting over three times the amount of campaign activity than other geographies • The close of Q3 and beginning of Q4 have seen elevated new campaign activity (15+ new campaigns between 9/27 and 10/8), potentially portending a busy end to 2021
2 Fewer Number of Board Seats Secured by Activists	• 73 Board seats have been won by activists in 2021 YTD, below historical average levels – While H1 Board seat activity was stable relative to prior years, only two new Board seats were won in Q3, an unusually low level • Through Q3, only 10% of Board seats secured by activists were won through final proxy votes, below the multi-year average of ~17% – High-profile examples of activists running proxy fights all the way to unsuccessful final votes include Starboard/Box and Legion/Genesco • Ancora,[1] Starboard and Elliott have together accounted for over a quarter of Board seats won YTD
3 M&A Related Activism Centers on Opposition to Deals	• 45% of all activist campaigns in 2021 YTD have featured an M&A-related thesis, above the multi-year average of 39% • Scuttling or sweetening an announced transaction remained the most prominent M&A demand, accounting for 53% of such campaigns YTD – In a prominent example of scuttle/sweeten M&A activism, TCI's open criticism of Canadian National's proposed acquisition of Kansas City Southern has ripened into a contentious proxy fight – While 100% of H1 2021 M&A-related campaigns in Europe were focused on opposing announced transactions, Q3 saw the return of campaigns pushing for a sale, break-up or divestitures
4 ESG Investing in Focus	• Investor statements regarding their integration of ESG considerations have come under increasing scrutiny, with a wide range of regulators and market commentators questioning investor claims – BlackRock, Vanguard and State Street remain targets of scrutiny even as they continue to support ESG-related proposals at accelerating rates • Nevertheless, inflows into U.S. ESG funds continued their record-breaking pace, as passive funds attracted the majority of YTD inflows ($31.4bn vs. $19.9bn in actively managed funds) • There has been much interest in how Engine No. 1 would follow up its successful proxy fight at ExxonMobil; thus far, the activist has launched its own ETF and published a white paper in support of GM's electric vehicle ambitions

Source: *FactSet, press reports and public filings as of 9/30/2021.*

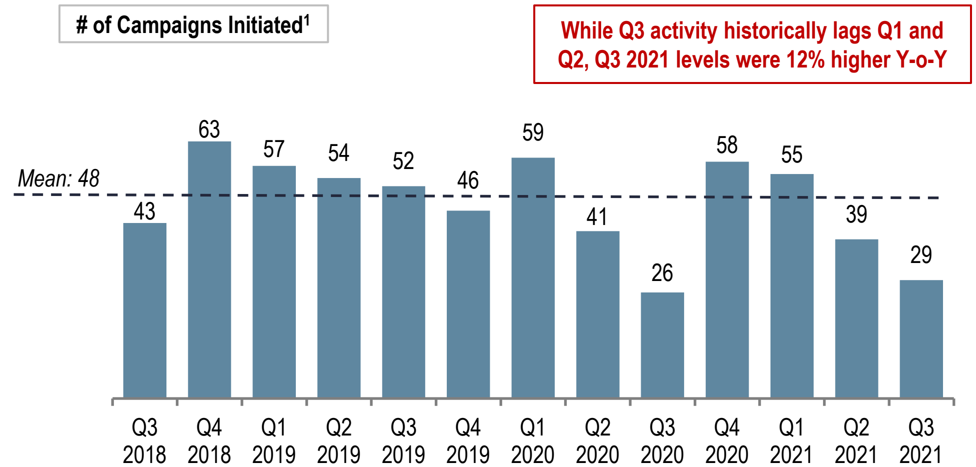
Global Campaign Activity and Capital Deployed

($ in billions)

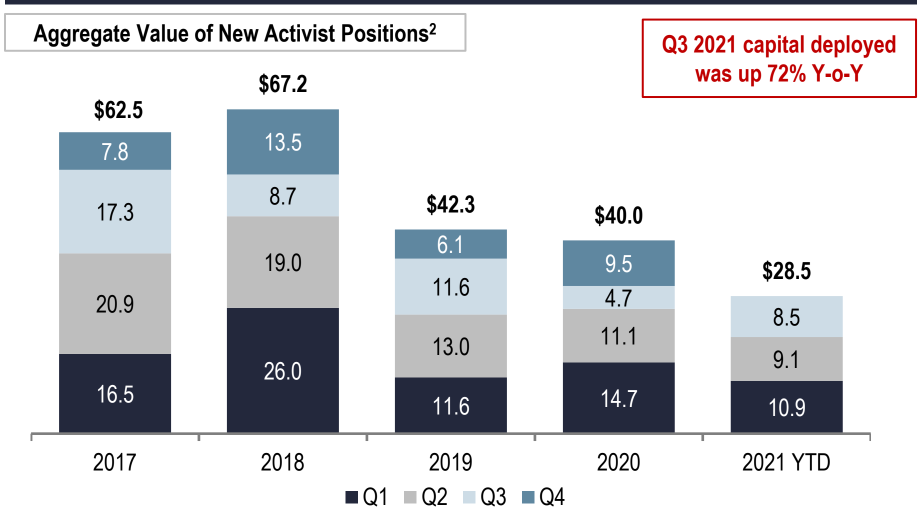
Annual Campaign Activity[1]



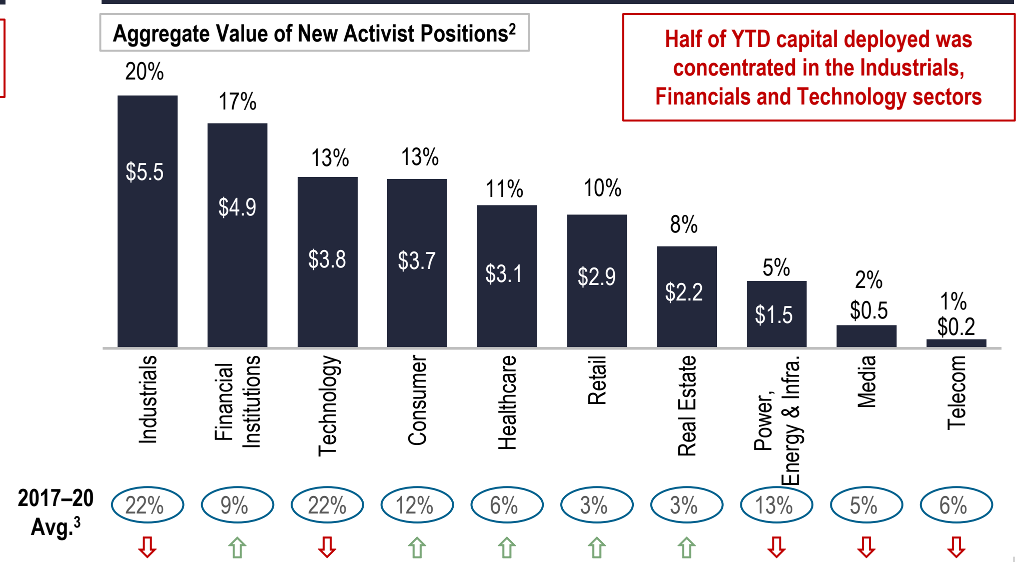
Quarterly Campaign Activity



Capital Deployment in New Campaigns ($bn)



Capital Deployed by Sector, 2021 YTD



LAZARD

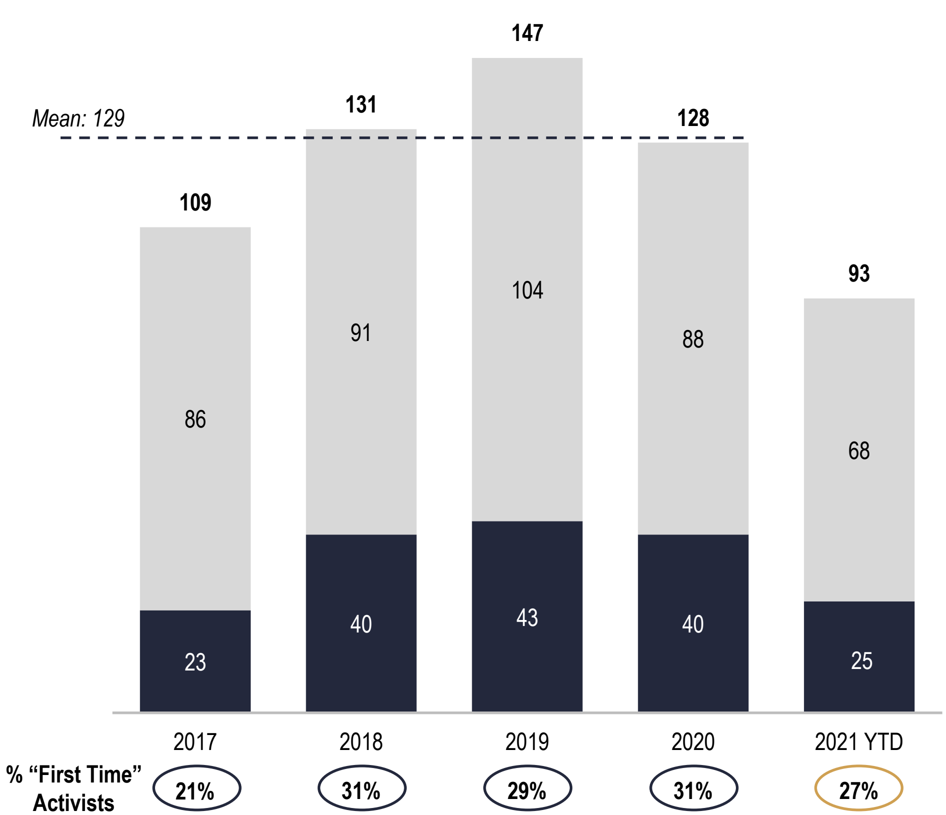
Global Activist Activity in 2021 YTD

($ in billions)

Elliott has dominated 2021 activity and has been especially active in Q2 and Q3, with five and six new campaigns in each respective period

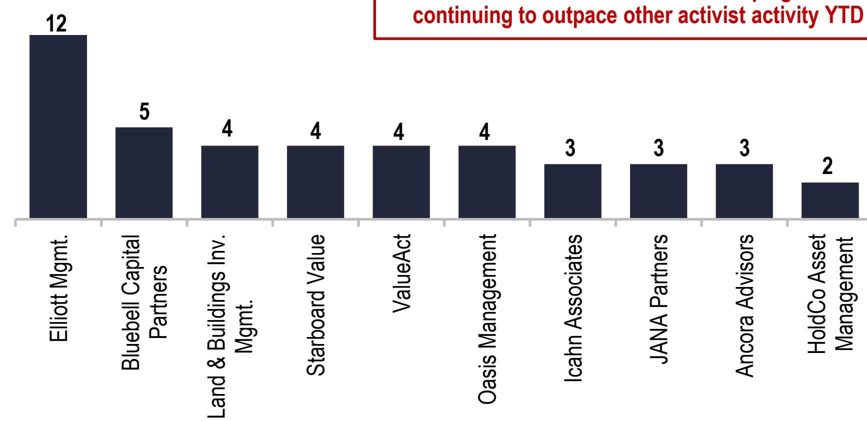
Investors Launching Activist Campaigns

YTD percentage of campaigns from first-time activist remained in-line with historical averages

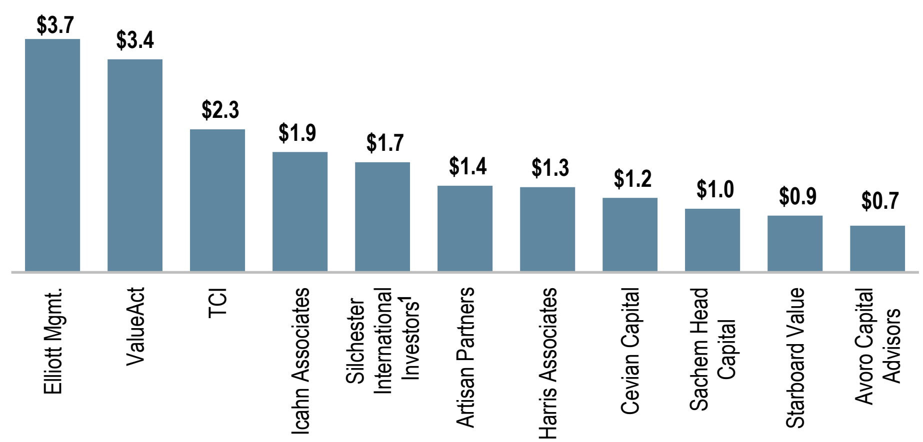


Activist Activity by Campaigns Launched, 2021 YTD

Elliott launched an additional six campaigns in Q3, continuing to outpace other activist activity YTD



Capital Deployed ($bn), 2021 YTD



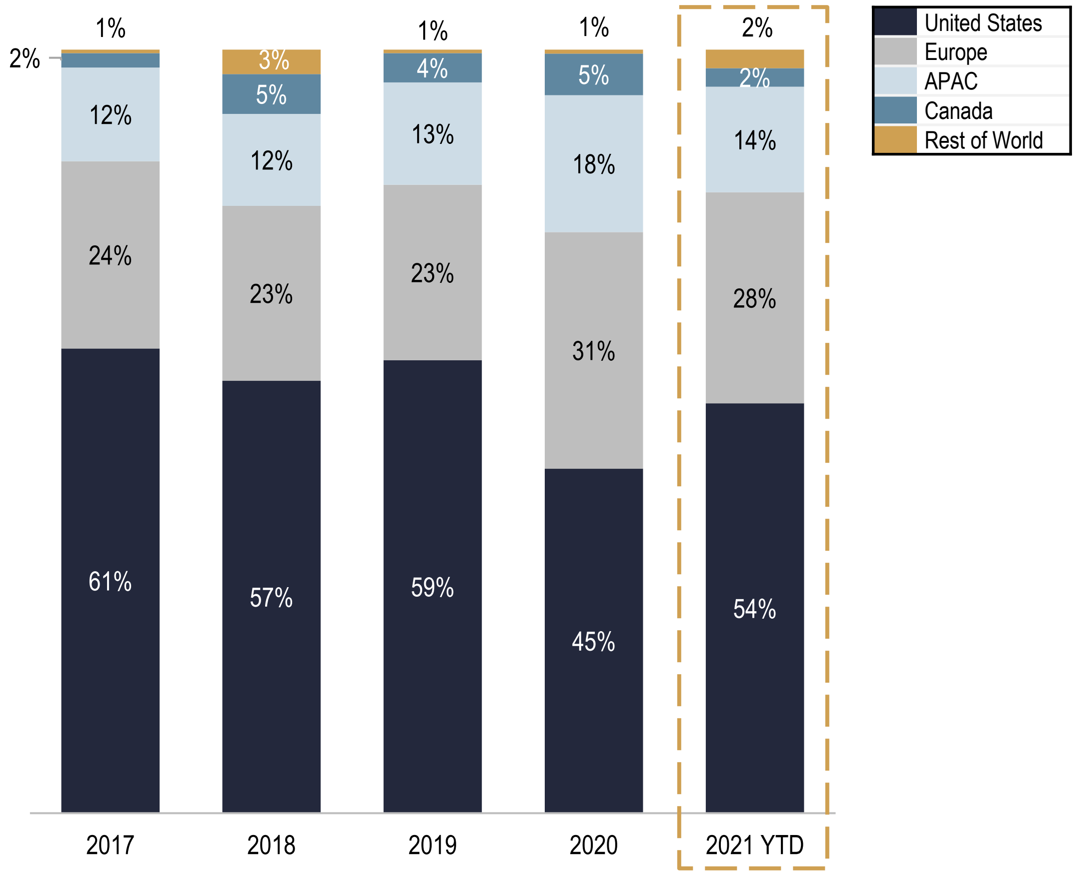
Source: FactSet, press reports and public filings as of 9/30/2021.

Regional Trends in YTD Global Activity

($ in billions)

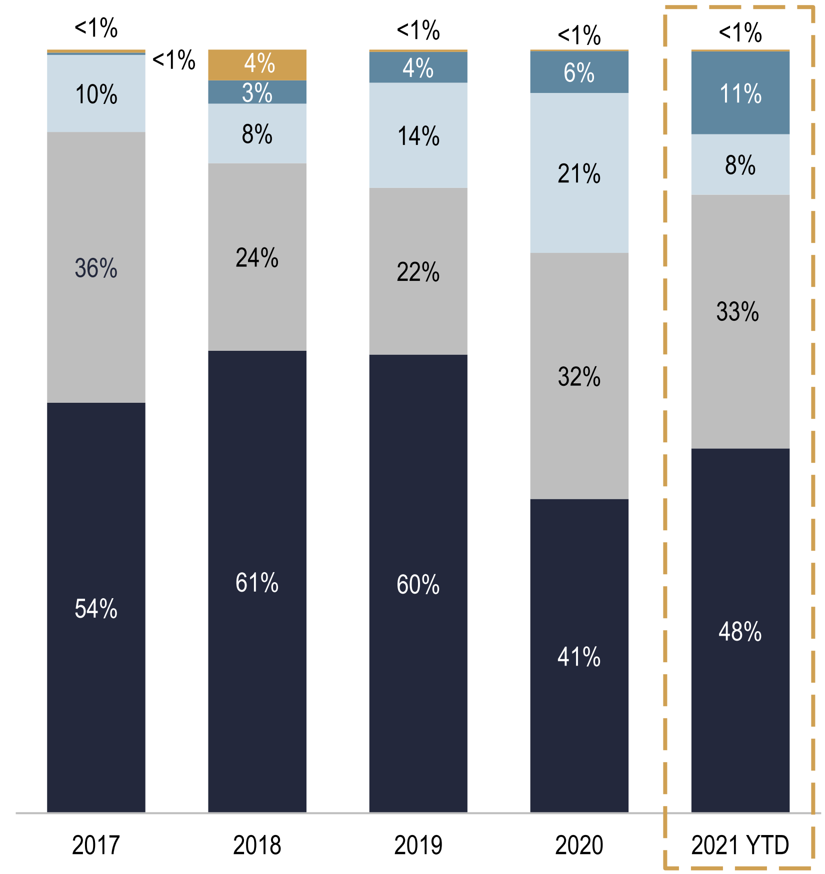
2021 YTD U.S. activity remains elevated compared to 2020 levels, representing 54% of global campaigns (up from 45%) and 48% of global capital deployed (up from 41%); European activity is above historical share, but below 2020, a year when ROW activism represented an out-sized percentage of activity; new campaign activity in APAC and Canada stalled in Q3 2021 after a strong start to the year

Regional Breakdown of Campaigns Initiated by Year



Regional Breakdown of Capital Deployed by Year

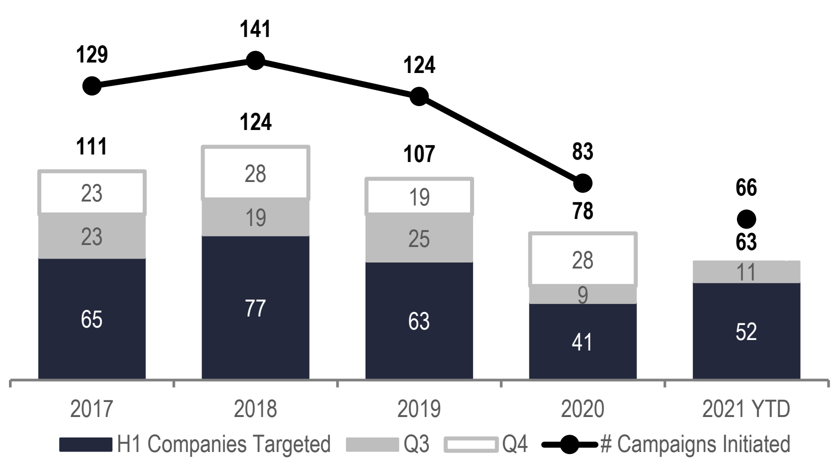
Y-o-Y increase in Canada reflects TCI's $2.3bn stake at Canadian National



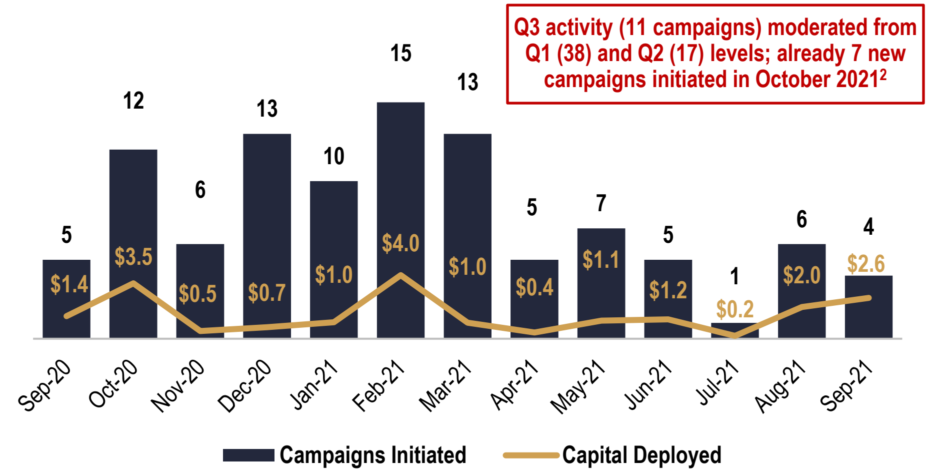
U.S.: Campaign Activity and Capital Deployed

($ in billions)

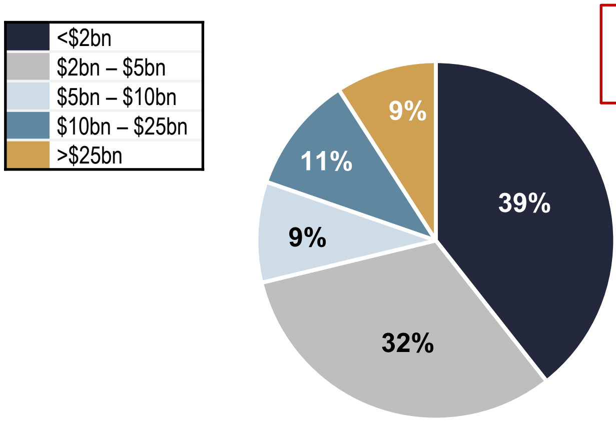
U.S. Annual Campaign Activity[1]



U.S. Campaign Activity by Month (LTM)

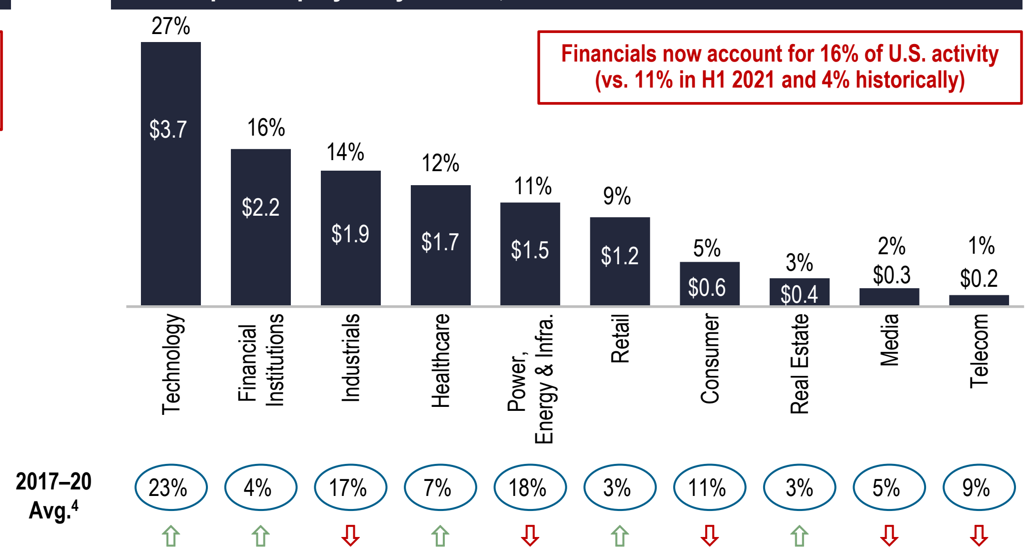


U.S. Market Cap. Breakdown of New Campaigns, 2021 YTD[3]



Small-cap companies (<$5bn) continue to be the primary targets of activist campaigns

U.S. Capital Deployed by Sector[3], 2021 YTD



Source: *FactSet, press reports and public filings as of 9/30/2021.*

U.S.: Notable Q3 2021 Public Campaign Launches and Developments

($ in billions)

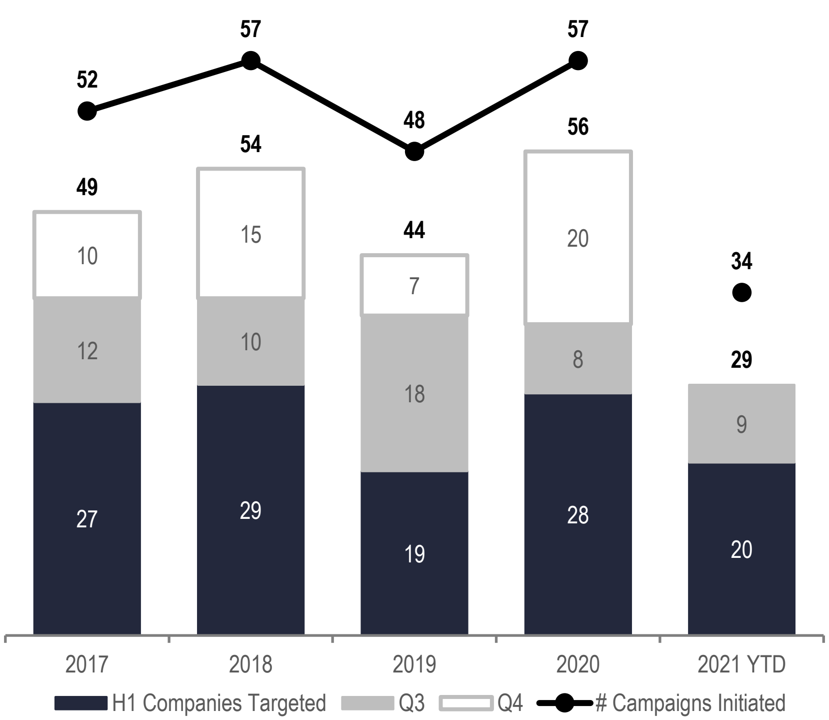
Launch Date	Company / Market Cap	Activist	Highlights
9/21	Huntsman $6.2	Starboard Value	• In September, *The Wall Street Journal* reported that Starboard had taken an 8.4% stake in Huntsman and intended to push for changes at the Company, though the exact demands were not disclosed
9/21	Citrix $13.2	Elliott	• In September, *The Wall Street Journal* reported Elliott had built a ~$1.3bn position in Citrix and intended to work with the Company to improve value; specific plans have not been disclosed – In 2015, Elliott had called for a review of non-core assets and buybacks at Citrix – Elliott's Jesse Cohn served on Citrix's Board until 2020 • *Post 9/30 update:* Citrix announced that David Henshall would step down as President and CEO
8/21	Fiserv $77.0	ValueAct Capital	• In August, ValueAct disclosed a ~$1.2bn position • *Bloomberg* subsequently reported that ValueAct believed Clover, the Company's credit card processing asset, could be spun off and would be worth ~$35-45bn
8/21	Switch $2.7	Elliott	• In August, Switch issued a press release disclosing Elliott had taken a stake and was collaborating with Switch on a review of operational and financial targets and the evaluation of a REIT election • Elliott's Jason Genrich was appointed to the Company's Board
5/21	Vonage $3.4	JANA Partners LLC	• In August, *Bloomberg* reported that JANA was pushing the Company to explore strategic alternatives, including a sale or break-up of the Company • In September, *Bloomberg* reported that Vonage was working with advisers to explore strategic alternatives
5/21	Duke Energy $79.8	Elliott	• In July, Elliott published a second letter reiterating its demands for new independent Directors and a breakup of the Company, claiming that recent shareholder feedback revealed skepticism of Duke's management and its ability to deliver value to shareholders
4/21	Genesco $0.8	Legion Partners	• In July, Legion lost its proxy fight at Genesco after all of the Company's Director nominees were re-elected at its 2021 AGM; ISS had recommended for the Company's nominees, though Glass Lewis had backed two of Legion's four nominees • In September, Legion called on Genesco to repurchase shares and sell both its Schuh and Johnston & Murphy businesses
9/19	Box $2.2	Starboard Value	• In September, Starboard lost its proxy fight at Box after shareholders voted to re-elect all three of Box's Director nominees at the Company's AGM; ISS had recommended that shareholders vote for all of Box's nominees while Glass Lewis had recommended that shareholders vote for Starboard's Peter Feld

Source: *FactSet, press reports and public filings as of 9/30/2021.*

Europe: Campaign Activity

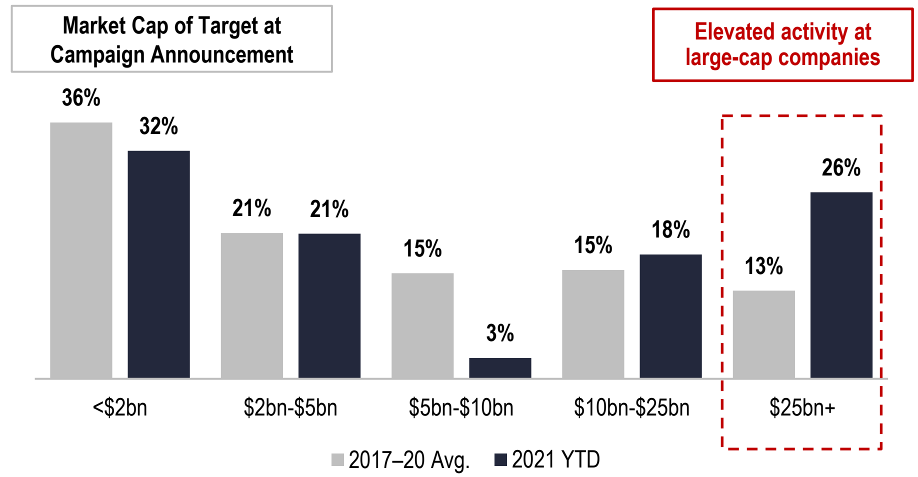
($ in billions)

European Annual Campaign Activity[1]

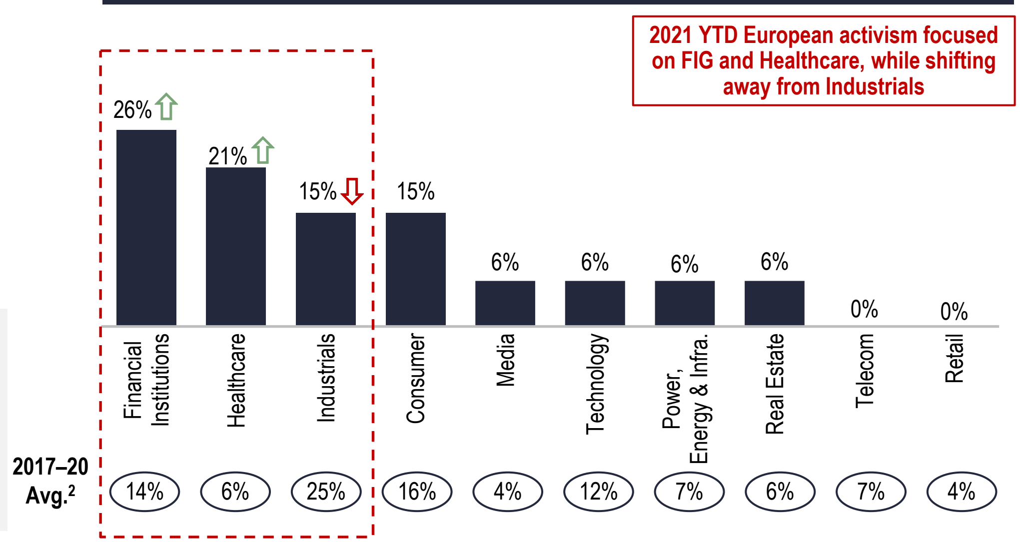


- **Following a record-setting Q4 2020, new campaign activity in Europe has slowed in 2021 YTD**
- **However, the 13 new campaigns initiated in Q3 2021 exceed Q1 and Q2 levels and may portend another uptick to end the year**

2021 YTD European Campaigns by Target Market Cap



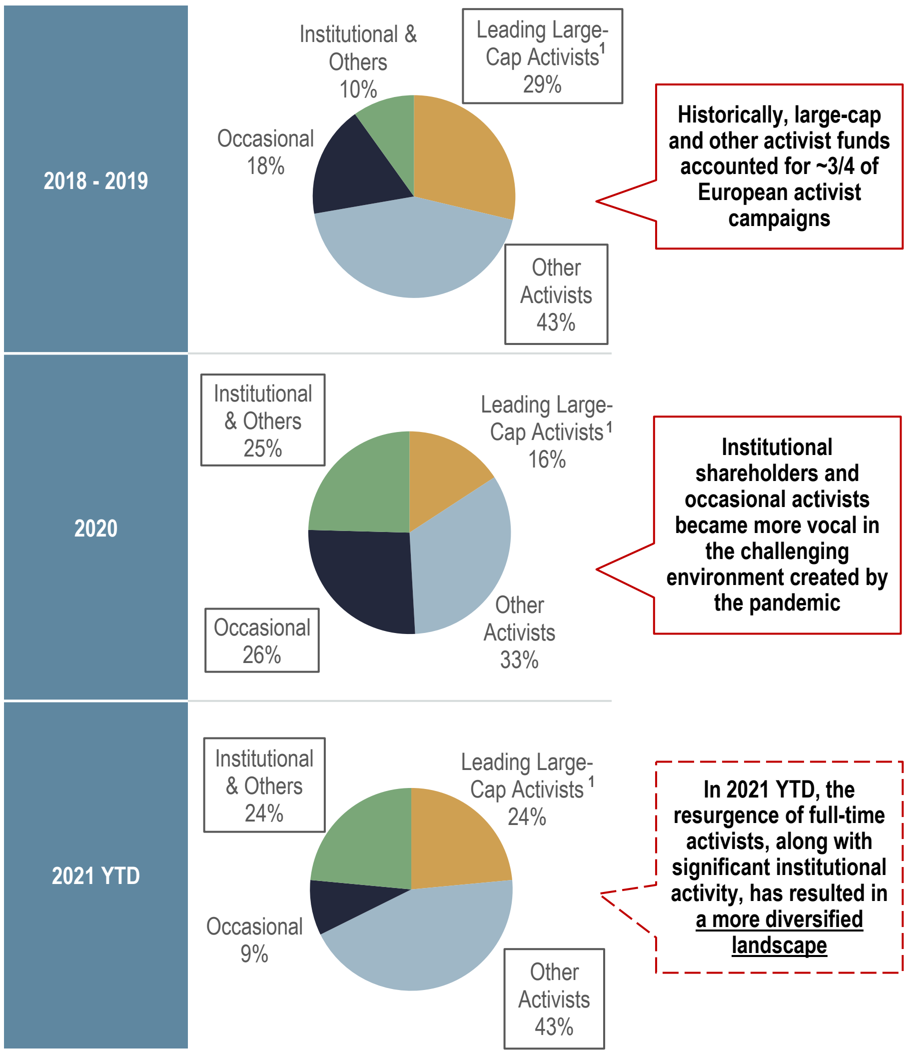
2021 YTD Campaigns by Sector (in %)



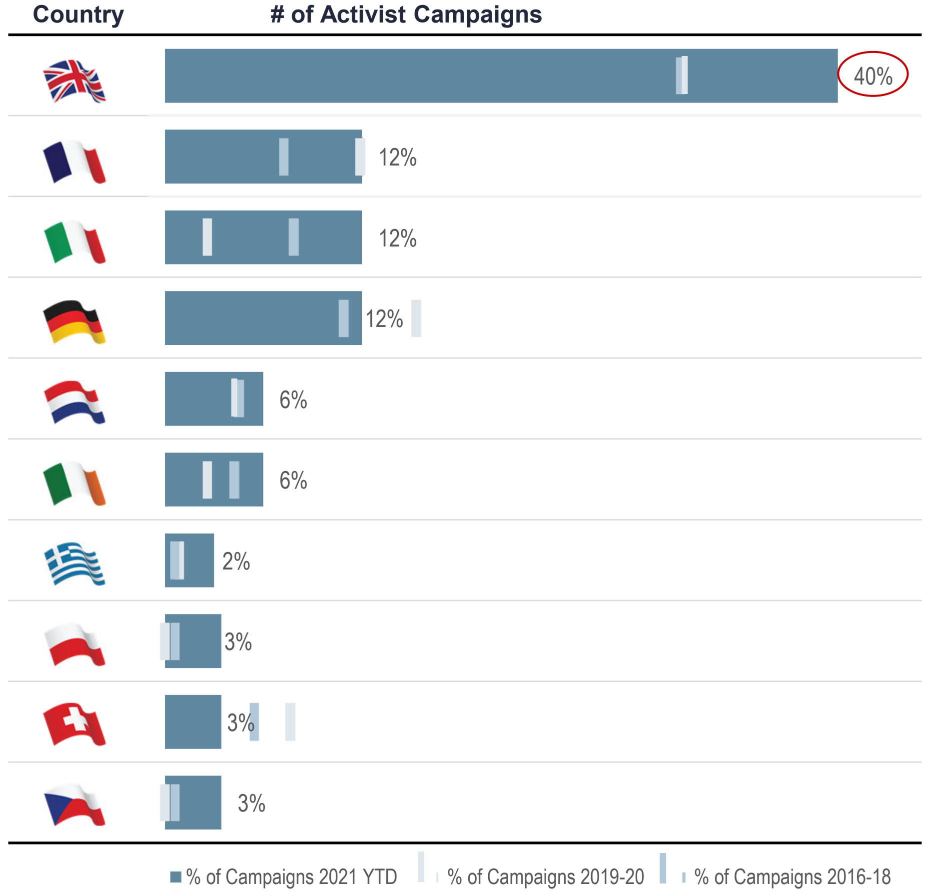
Source: *FactSet, press reports and public filings as of 9/30/2021.*

Europe: UK in the Cross-hairs and Return of Large-Cap Activists

Campaigns by Activist Category



Campaigns by Geography

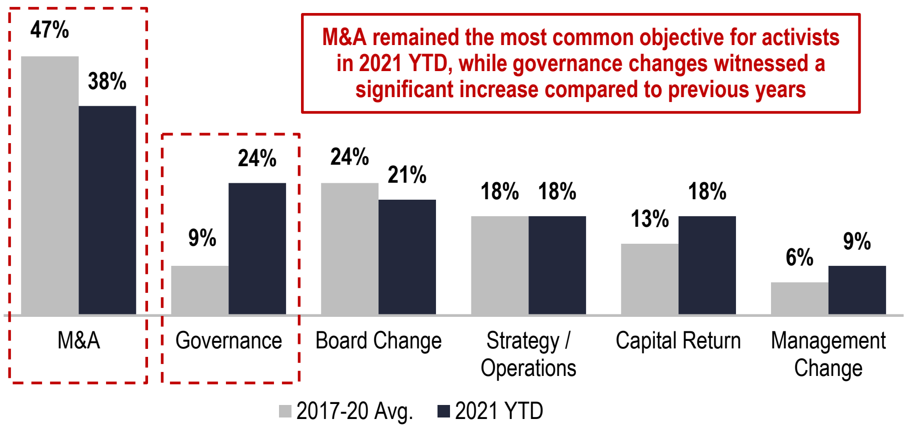


- **UK companies have been exceptionally targeted in 2021, attracting ~3.5 times as many campaigns as companies in any other country**
  - Even by historical measures, UK companies are finding themselves at odds with shareholders more frequently than ever

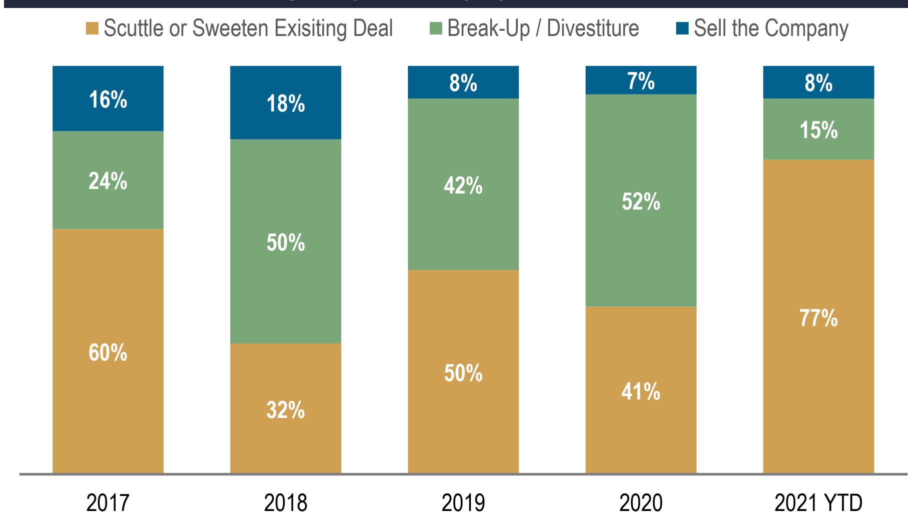
Source: FactSet, press reports and public filings as of 9/30/2021.

Europe: Continued Focus on M&A Thesis and Impact of Unseating Leadership

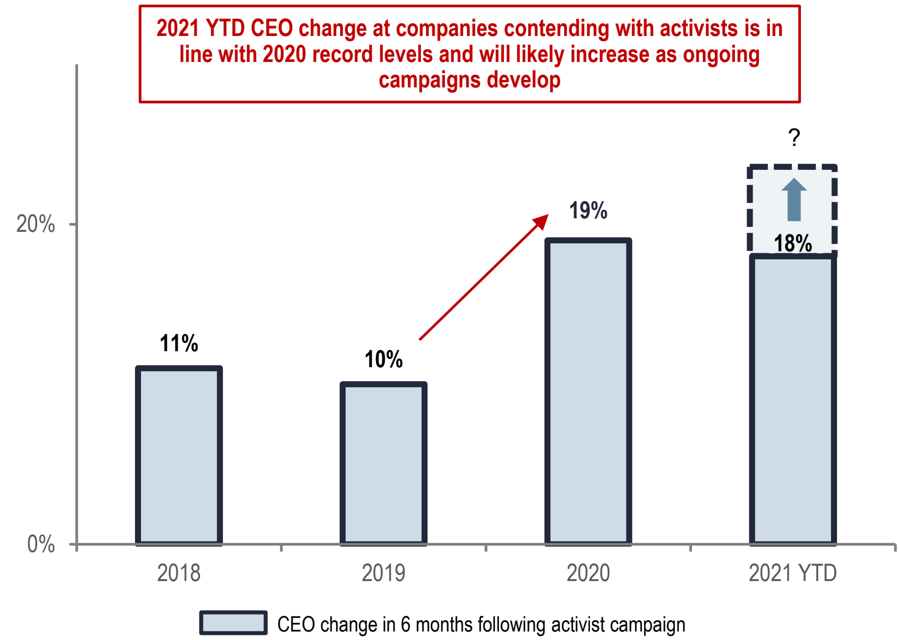
2021 YTD European Campaign Objectives



European M&A Campaign Objectives by Type



CEO Change Following European Campaigns



- **Despite a downtick in the proportion of M&A-related activist campaigns in 2021 YTD, it remained the most common campaign objective in Europe**
  - M&A campaigns are increasingly centered on opposing announced transactions
- **Leadership change catalyzed by activist pressures has escalated since 2019, irrespective of stated campaign objective(s)**

Europe: Notable Q3 2021 Public Campaign Launches and Developments

($ in billions)

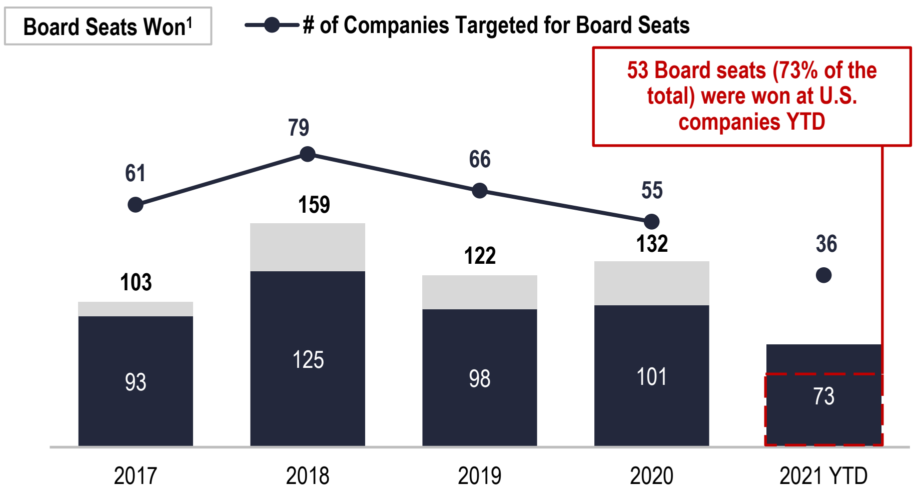
Launch Date	Company / Market Cap[1]	Activist	Highlights
7/21 9/21	GSK (GlaxoSmithKline) $98.1 UK	Elliott Bluebell Capital Partners	• In July, Elliott initiated a campaign criticizing its persistent operational and share price underperformance and calling for Board refreshment • In September, Bluebell sent a letter to GSK calling for a re-evaluation of the Board and leadership in the lead up to GSK's demerger • *Post 9/30 update:* Bluebell sent a letter to GSK's Board demanding the replacement of Chairman Jonathan Symonds
9/21	RWE $26.1 Germany	Enkraft Capital	• In September, Enkraft Capital pushed RWE to accelerate the divestment of its coal operations to enhance its valuation as a more attractive ESG investment – Divesting could help close the valuation gap with pure-play renewable companies • Enkraft wrote a letter to the CEO and stated that RWE was "no longer investable" to ESG investors because of its coal activities despite a significant pivot toward renewable energy
8/21	Rolls-Royce $13.4 UK	Causeway	• In August, Causeway, Rolls-Royce's largest investor, called on the incoming Chairwoman to refresh the Board of Directors and examine whether the Board had the right expertise to face the challenges ahead including the transition to net zero • The investor also urged the Company to consider the disposal of its power systems business, which could reduce complexity and cut the group's debt burden

Launch Date	Company / Market Cap[1]	Activist	Highlights
8/21	SSE $23.5 UK	Elliott	• In August, press reported that Elliott took a large stake in SSE • In September, *Bloomberg* reported that Elliott had called for a break-up of the Company's renewables and regulated electricity businesses • A week later, SSE published a press release emphasizing its plans to increase capital investment and reiterating that there are currently no plans to separate the businesses
6/21	Aviva $23.5 UK	Cevian Capital	• In June, Cevian Capital disclosed a ~5% stake in Aviva and criticized the Company's cost structure and strategic decisions, while stating that Aviva could increase its dividend and share price • The public statement followed the newly appointed CEO's decision to exit operations in several non-core countries • In August, Aviva announced that it will return £4bn to shareholders after pursuing asset sales, £1bn less than what Cevian demanded
5/21	Vivendi $42.8 France	Bluebell Capital Partners Artisan Partners	• In May, Bluebell demanded that Vivendi pay an extraordinary cash dividend with the spin-off of Universal Music Group and move a planned listing from Euronext to NYSE (or dual) • In June, Bluebell sent a letter to the French regulator (AMF) raising concerns that the spin-off was considered without informing investors or seeking their approval • A few days later, Artisan Partners said it would vote against Vivendi's planned spin-off • Later in June, the separation resolution passed with ~99% approval from shareholders

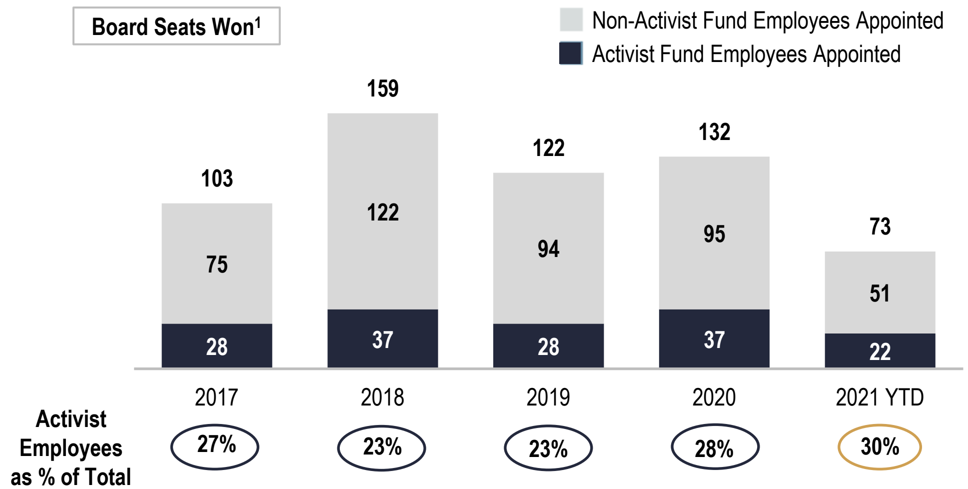
Global Board Seats Won

73 Board seats have been won by activists YTD, a decrease of ~28% year-over-year; 90% of seats secured have been through settlements, tracking above historical averages

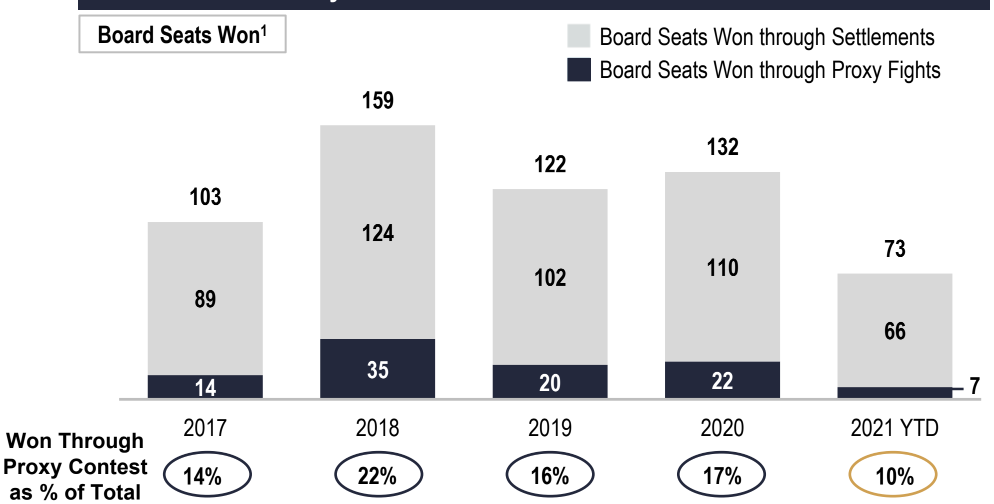
Board Seats Won[1]



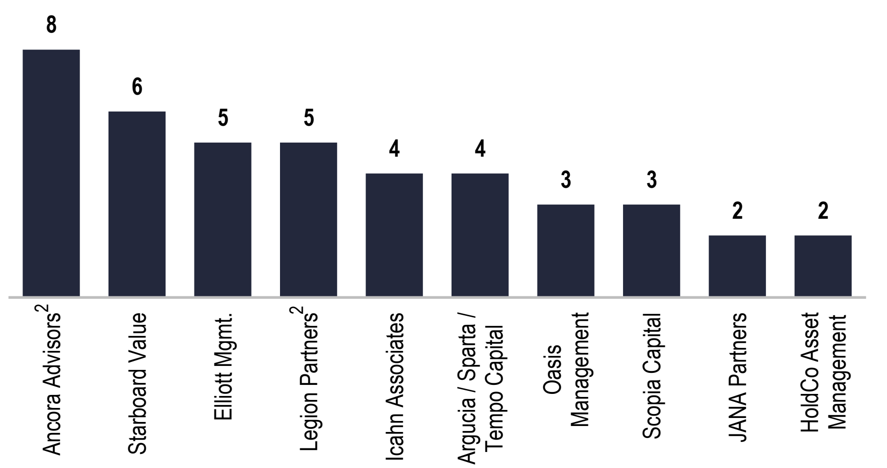
Non-Activist Employees vs. Activist Employees Appointed as Directors



Settlements vs. Proxy Contests



Board Seats Won by Activists, 2021 YTD



Source: *FactSet, press reports and public filings as of 9/30/2021.*

Starboard's Unsuccessful Proxy Fight at Box

Starboard's high-profile campaign at Box ended in defeat for the activist's three nominees

Campaign Timeline

- **In September 2019, Starboard filed a 13D disclosing a 7.5% stake in Box**
- **In March 2020, Starboard and Box agreed to add three new Directors and create a new Board committee with the mandate to "identify and recommend opportunities for further improvement in growth and margin performance"**
- **In April 2021, Box announced that KKR would make a $500mm convertible preferred investment in the Company in exchange for one Board seat**
  - Starboard argued that KKR's investment was a defensive tactic "transparently done to insulate management and the Board"
- **In May 2021, Starboard sent a letter to the Board outlining disappointment with continued poor results, frustration with shareholder returns and capital allocation decisions and a new plan to nominate independent Directors**
- **In June 2021, Starboard publicly challenged the legality of KKR's investment in Box and submitted a books and records request to Box in order to investigate the investment; Box declined the request, claiming it did not establish a credible basis for any wrongdoing**
- **In July 2021, Box released its proxy statement which claimed Starboard had been invited to participate in the KKR investment as part of a potential settlement offer, but all offers were rejected as the Company was not willing to install Starboard managing member, Peter Feld, to the Board**
- **In August 2021, Starboard publicly announced its plan to boost performance at Box and advanced its call for Board seats**
- **In September 2021, Box's three Director candidates were re-elected**
  - Vanguard issued a voting bulletin announcing its support of Box's slate due to insufficient time since the 2020 settlement to draw conclusions about performance, recent Board refreshment and governance improvements – each of which indicated responsiveness to shareholders

Voting Results

		% Voted FOR[1,2]	ISS Recommendation	Glass Lewis Recommendation	Elected?
Management	Dana Evan	33%	WITHHOLD	DO NOT VOTE	✓
	Peter Leav	56%	FOR	DO NOT VOTE	✓
	Aaron Levie	60%	FOR	DO NOT VOTE	✓
Dissident	Debora Conrad	14%	DO NOT VOTE	AGAINST	✗
	Peter Feld	20%	DO NOT VOTE	FOR	✗
	Xavier Williams	14%	DO NOT VOTE	AGAINST	✗

Proxy Fight Commentary

"We believe Peter Feld wants to be on the Board because **the Box Board of Directors (including the two Starboard-approved Directors) exercised independent judgment to act in the best interests of all stockholders** rather than capitulate to Starboard's demands"

BOX, 9/12/2021

"We have covered tech/software for 18 years and have never come across a company that is a leader in a $40bn TAM and continues to mis-execute so badly…**It is also amazing to us the Board of Directors has done nothing to push the issue**"

STARBOARD, 8/9/2021

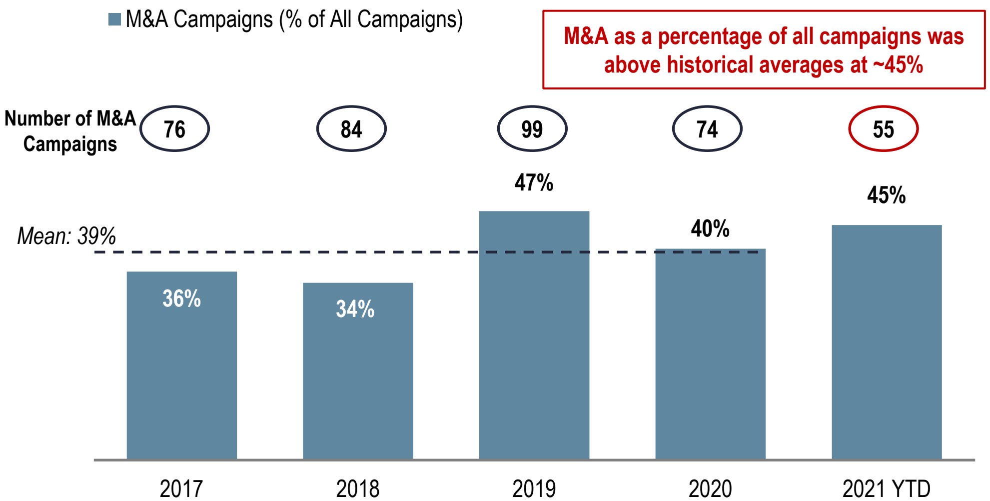
Source: Company filings, press reports, Starboard website and FactSet.

Sustained Prominence of M&A-Related Campaigns Globally

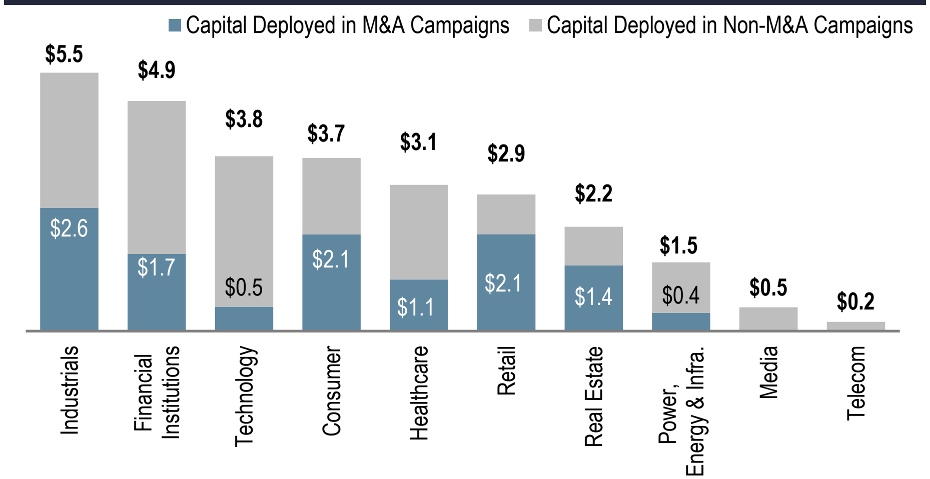
($ in billions)

The mix of M&A-related activism continued to shift towards challenging existing transactions

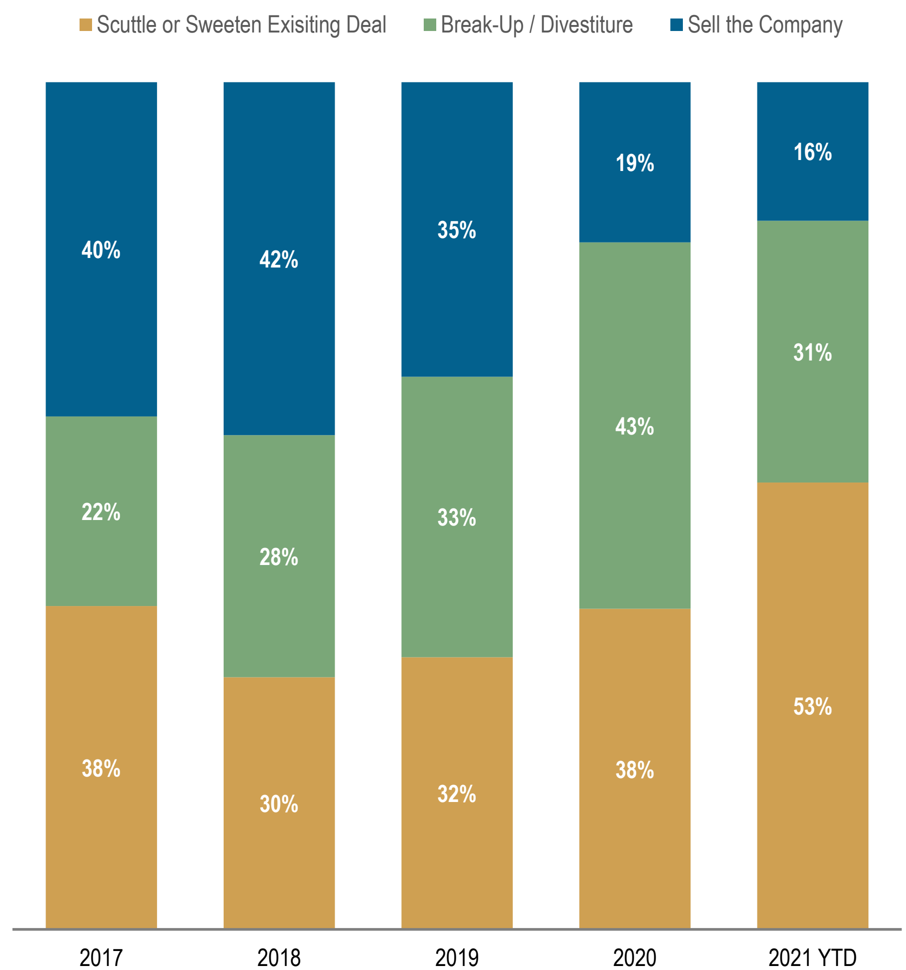
M&A Campaigns



Capital Deployed in M&A Campaigns by Sector, 2021 YTD



M&A Campaign Objectives by Type



Source: *FactSet, press reports and public filings as of 9/30/2021.*

TCI's M&A Campaign Leads to Proxy Battle at Canadian National

TCI's campaign at Canadian National, which originated as an assertive attempt to scuttle the Company's acquisition of Kansas City Southern, has evolved into a closely-watched proxy fight

Campaign Timeline

- **In April 2021, Canadian National ("CN") put forth a ~$34bn bid for Kansas City Southern ("KCS"), several weeks after KCS had agreed to a sale to Canadian Pacific ("CP") for ~$25bn**
- **In May 2021, TCI, a large shareholder of both CN and CP, sent a letter to CN's Board demanding the Company abandon its bid amid regulatory uncertainty**
  - TCI founder, Christopher Hohn, sent a letter suggesting such a transaction would be "negligent and hugely irresponsible" after the Surface Transportation Board ("STB") indicated it would not rule on CN's proposed voting trust agreement until after the deal had closed
- **In August 2021, CP increased its bid for KCS to ~$31bn, prompting KCS to reject the offer and adjourn a meeting scheduled to vote on the CN merger until the STB issued its vote**
  - TCI filed a 13D on August 18, increasing its stake in CN to 5.2% (from 4.2%)
- **After the STB announced it would reject the use of the voting trust agreement for a CN-KCS transaction on August 31, KCS stated it considered CP's bid "superior" and then entered into a merger agreement on September 15**
- **In September, the situation at CN pivoted to TCI's proxy battle, which remains ongoing**
  - TCI has since called for the resignation of CN Chairman Robert Pace and CEO Jean-Jacques Ruest; Hohn's letter called the Board's sanctioning of the KCS bid "an egregious failure of oversight and there must be accountability"
  - TCI announced it would requisition a special meeting of shareholders (set for March 22, 2022) to nominate Directors to CN's Board, claiming change was needed to address operational and governance failings, and unveiled a slate of four nominees
  - Caisse de dépôt et placement du Québec sent a letter to CN expressing support for its pursuit of KCS in May and voiced support for CN in its battle with TCI
  - TCI sent a letter to Pace further criticizing the Board's "commitment to good corporate governance" following its handling of Director Julie Godin's resignation
- **In October, CN issued a public statement challenging the validity of certain statements and arguments made by TCI**

Shareholder Vocalism

"[Canadian National] actually did their homework .. We thought it was a good deal. These kind of opportunities happen very rarely … **The outcome was different than expected, but they were rigorous in the process**"

"It's pretty rare you actually see an activist sitting on both sides of the trade with two potential buyers. So one has to understand or question what are the real motivations here."

CHARLES EMOND INTERVIEW WITH BLOOMBERG, 9/22/2021 CDPQ

TCI Commentary

"CN's unsuccessful bid for Kansas City Southern exposed a basic and fundamental misunderstanding on the part of the Board of the current state of the railroad industry and regulatory environment. **The Board, which lacks meaningful railroad operational experience, consistently misjudged the Surface Transportation Board and displayed flawed decision making, committing billions of dollars to an ill-conceived pursuit of what was, in reality, an unattainable asset**. From the start, it was clear the bid would fail. That the Board sanctioned the bid, together with potential termination fees of approximately $2 billion, is a failure of oversight and there should be accountability.

Assembling a Board with no meaningful railroad operational experience is itself a reflection of poor corporate governance that should be rectified as soon as possible."

TCI PROXY CIRCULAR, 8/9/2021 TCI Fund Management

Source: Company filings, press reports and FactSet.

Updates to the ESG Landscape

A deepening scrutiny of ESG claims has been one of the key themes of the quarter, as regulators hone their approach and market observers call into question the claims of ESG-focused investors

Growing Scrutiny of ESG Claims	• Increasing market participant and observer sophistication on ESG issues has led to deepening scrutiny of investor statements – *The Wall Street Journal* reported that the SEC and U.S. Justice Department were investigating DWS Group following allegations from the asset manager's ex-head of sustainability that the firm overstated the extent to which it utilized ESG considerations • A sample letter from the SEC highlighted the approach it may take in scrutinizing environmental disclosures by issuers, including requests for quantified disclosure of capital expenditures on climate-related projects and carbon credits / offsets
"Big 3" Remain In Focus	• The commitments of the "Big 3" (BlackRock, Vanguard and State Street) continue to come under scrutiny even as they report increasing levels of support for ESG-related proposals and priorities – In H1 2021, Vanguard supported 50% of diversity, equity and inclusion-related and 37% of environmental-related proposals – For the July 1, 2020 – June 30, 2021 period, BlackRock supported 64% of environmental proposals and 47% of E&S proposals overall – In H1 2021, State Street supported 46% of climate-related proposals and voted against Board members at 43 S&P 500 companies for lack of Board diversity data disclosure
Engine No. 1's ESG Focus Continues	• Following its Q2 2021 proxy contest defeat, ExxonMobil has not yet announced any major initiatives, although *The Wall Street Journal* reported that the Company has evaluated whether to issue a net zero carbon emissions pledge • *Reuters* reported that Engine No. 1 has also held "cordial" discussions with Chevron regarding the Company's emissions reduction strategy, though the fund has not given any indication it intends to launch a public campaign • The activist has been busy broadening its operations – The investor has launched one ETF focused on voting and engagement with U.S. large cap companies and is reportedly launching a second focused on climate issues – Engine No. 1 is also currently fundraising across its investment products – The activist has also released its "Total Value Framework" detailing how it incorporates ESG concerns into traditional financial analysis • *Post-9/30 Update: The Wall Street Journal* reported that Engine No. 1 had built a stake in GM and was supportive of management's actions relating to increased electric vehicle production and its long-term strategy
Climate Remains in the Spotlight as COP26 Approaches	• Much of the market's focus remains on the outcomes of negotiations at the 26th UN Climate Change Conference of the Parties (COP26), being held from October 31 – November 12 – There have been numerous net zero pledges from corporates in advance of the conference, most notably 86 new signatories joining the Amazon-backed Climate Pledge, in which signatories pledge to achieve net zero carbon emissions by 2040 • There have been further commitments to net zero initiatives, including the formation of the Net Zero Financial Service Providers Alliance, which includes the "Big 4" professional services firms, S&P and Moody's, among other firms

Source: FactSet, press reports and public filings.

Passive Inflows Continue to Drive Record Year for U.S. ESG Funds

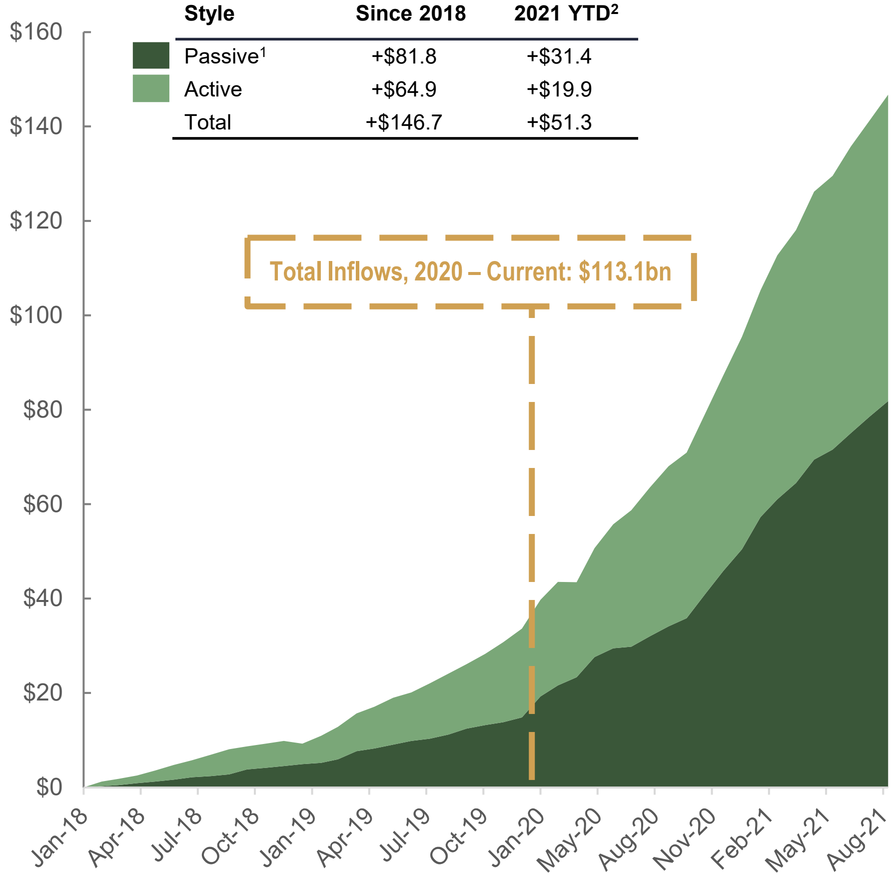
($ in billions)

Inflows into passive U.S. ESG-related funds continue to fuel a record pace for related inflows

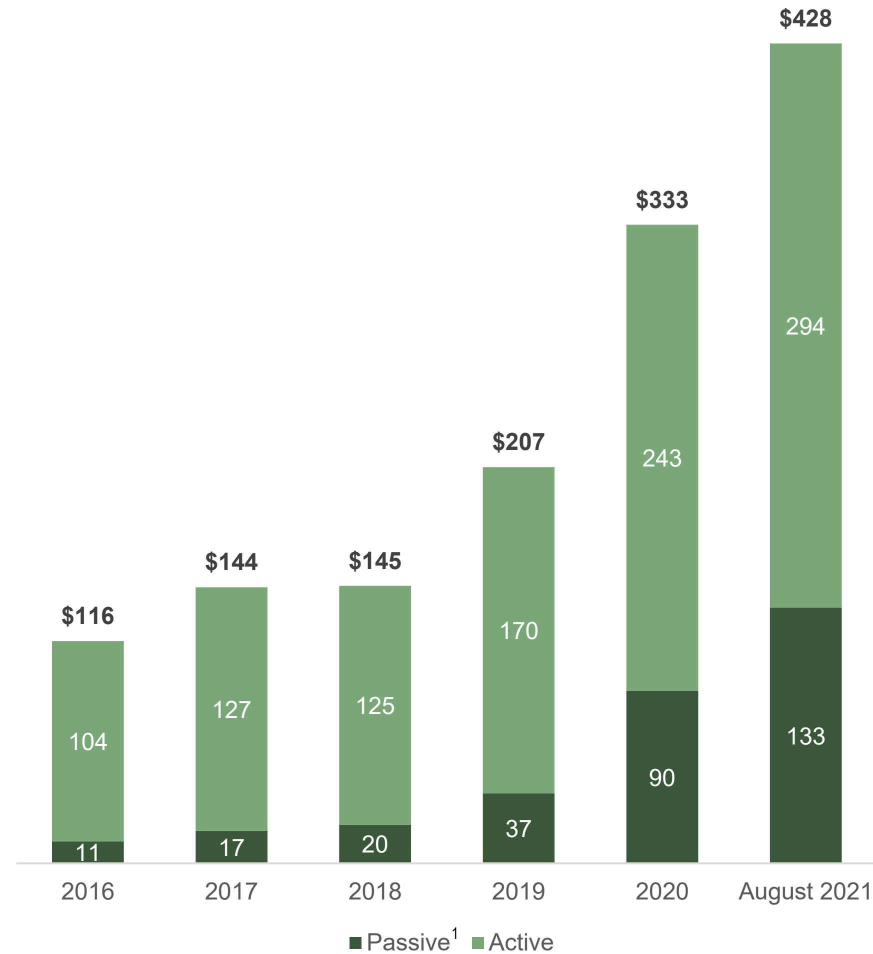
U.S. ESG Mandate Net Equity Fund Flows ($bn), 2018 – August 2021

Cumulative U.S. ESG Mandate Net Equity Fund Flows

Style	Since 2018	2021 YTD[2]
Passive[1]	+$81.8	+$31.4
Active	+$64.9	+$19.9
Total	+$146.7	+$51.3



U.S. ESG Mandate Equity Fund AUM ($bn), 2016 – August 2021



Source: SimFund, press reports and public filings.

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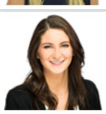	Leah Friedman	Associate	(212) 632-6685	leah.friedman@lazard.com
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M&A ACTIVISM

2021

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INTELLIGENT ANALYTICS

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CONTENTS

M&A Activism 2021

A message from our Editor-in-Chief Josh Black, Insightia

Unlike lightning, M&A activism has been known to strike the same spot, sometimes several bolts at once, other times spaced out over several years. This high-stakes – some would say occasionally destructive – form of activism has been given a new lease of life by the pandemic.

Although we cover individual situations blow-by-blow through our subscription service, *Activist Insight Online*, this is a great opportunity to bring together some of the trends and developments of the past two years and we're grateful for the support of our sponsors, Vinson & Elkins and Morrow Sodali, in bringing this report to life.

You can hear more from me, Michael Verrechia, Lawrence Elbaum, Patrick Gadson, and Insightia's Kieran Poole on an episode of *The Activist Insight Podcast* that has been released to accompany this report.

To learn more about Insightia and to receive our forthcoming *Proxy Voting Annual Review 2021*, sign up for our newsletters.

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HARVEST TIME

Activists are following in the wake of record M&A volumes, cashing in on opportunities to make a quick buck. But preparing for life after the boom will test the sophistication of these strategies, writes Josh Black.

M&A activism, a firmament in the toolbox of hedge funds and institutional investors alike at times of bounteous dealmaking, has the advantage of being available both to the proactive and reactive. When dealmaking is lean, some activists seek to put companies in play. When it is rich, the possibilities widen to include not just straight up sales but breakups, bumpitrage, and opposition.

Insightia data show that the number of companies publicly subjected to activist demands pushing or opposing M&A declined only slightly during 2020, when overall campaign volume was down sharply. And although fewer companies have received M&A demands so far in 2021 compared with last year, M&A activism is rising as a share of economic demands – that is, excluding those related to ESG, compensation, and board composition.

"WITH SOME NOTABLE EXCEPTIONS, THE MOST PROMINENT M&A ACTIVISM OVER THE PAST YEAR HAS BEEN REACTIVE."

"M&A activism has been the trend that activism has been moving toward for a number of years," said David Hunker, the leader of EY's shareholder activism defense team in the Americas, and a former banker. "In an environment where relatively few activists are willing to sit on boards for three-to-five years, M&A is one of the strategies they can leverage to create value."

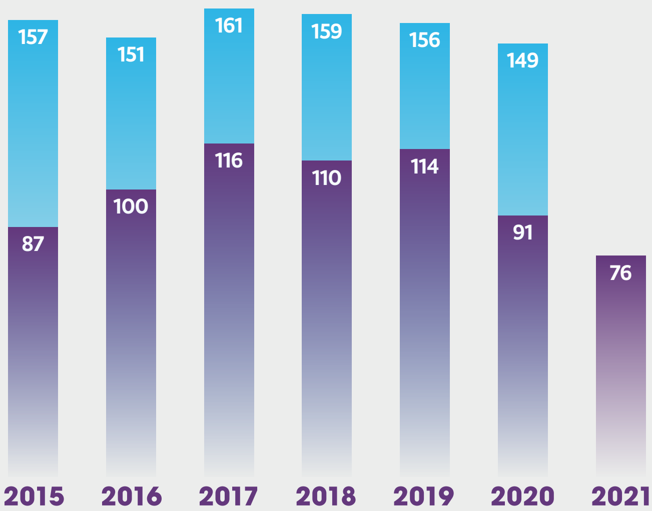
KEEPING UP WITH THE C-SUITE

With some notable exceptions, the most prominent M&A activism over the past year has been reactive. Six years of boards being told to "be your own activist," has ensured that breakups and strategic alternatives rarely go unreviewed – especially now benign financial conditions have boosted CEO confidence. That is just as well, since hardly any deal these days does not face some shareholder arguing for a bump, a block, or a review of how it has been structured.

The trend may be partly circumstantial – a buoyant M&A market with volatile stock prices creates plenty of opportunities. "Some deals didn't look as good as when they were struck, and activists have tried to take advantage," says Bill Anderson, head of raid defense at investment bank Evercore. In addition, take-privates involving cash-rich private equity firms and the potential for rival bidders to jump into deals have also emboldened activists to argue for an increased premium in return for their support, he says.

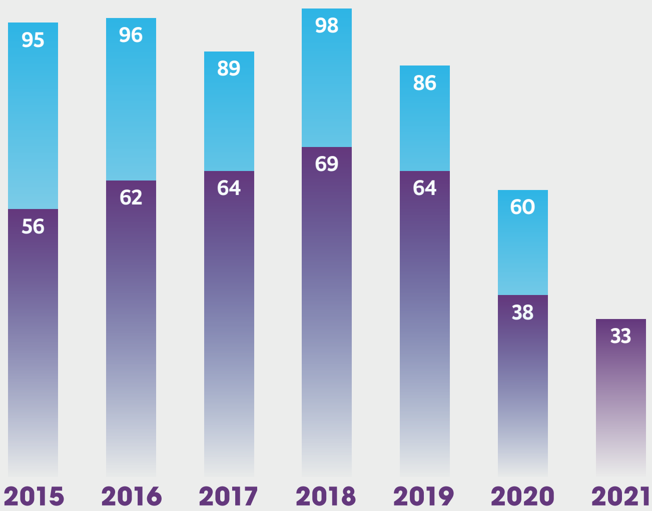
Unlike two years ago, when a wave of activism hit acquiring companies amid fears of strategic overreach, the current wave of activism mostly aims to improve terms for selling shareholders, rather than block deals outright. Advisers interviewed for this report cite a variety of reasons, from risk asymmetry to market volatility and varied economic forecasts for these disagreements.

GLOBAL M&A ACTIVISM TARGETS



Number of companies worldwide publicly subjected to activist demands opposing or pushing for M&A by year. (YTD values in purple as of August 31 of each year)
Source: Insightia | Activist Insight Online

US M&A ACTIVISM TARGETS



Number of U.S.-based companies publicly subjected to activist demands opposing or pushing for M&A by year. (YTD values in purple as of August 31 of each year)
Source: Insightia | Activist Insight Online

"IT'S BECOME MORE COMMON THAT AN ACTIVIST SHOWS UP AT A TARGET AROUND THE SAME TIME THAT A TARGET RECEIVES AN ACQUISITION PROPOSAL."

Nonetheless, deal opposition is a strategy that requires high confidence or strong emotion in the U.S., which has fewer legal advantages for minority shareholders, and tactical nous even in those countries that provide more protections. Many of its practitioners are occasional activists, reacting to events in stocks they already held, or arbitrageurs.

MAKING THE WEATHER

Public activist campaigns seeking to initiate deals have been slower to recover, although some advisers expect those to pick up in the future. "I think the pandemic did present opportunities where some companies continue to trade more cheaply and can be easier to identify as targets," says Duncan Herrington, a managing director at Moelis & Co.

However, the better-capitalized funds have enjoyed plenty of opportunities, even if it means competing with different categories of financial sponsors. Takeover attempts by dedicated activists peaked in 2020, as much the result of a long-term trend as the volatility of the pandemic. Elliott Management's acquisition of Cubic alongside private equity firm Veritas Capital was its third successful deal in two years, according to Insightia data, as many as it had completed in the previous eight. Special purpose acquisition companies (SPACs), in some ways the inverse of M&A activism since they involve bringing private companies public, have entranced others including Starboard Value, Pershing Square Capital, and Hudson Executive Capital.

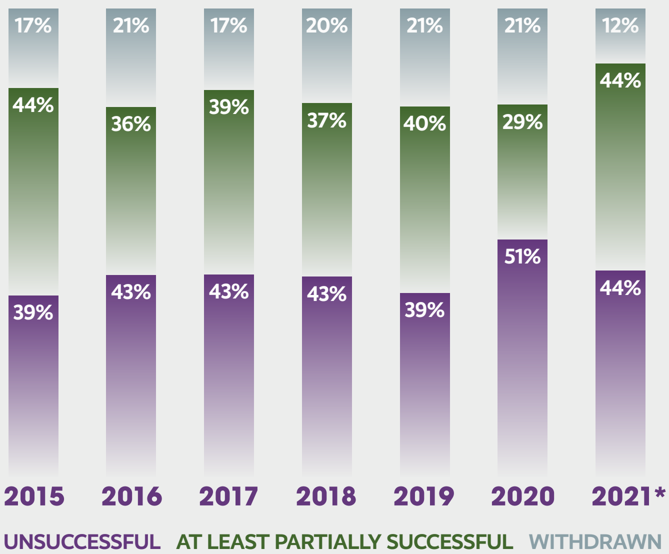
Senator Investment Group and Cannae Holdings put CoreLogic in play last year with a clever strategy that combined their own takeover approach with a proxy fight. Although they were comfortably outbid in the end, the campaign was likely a lucrative one.

But putting companies in play has become a less explicit strategy for activists than in years past, something Anderson says may be down to activists picking their targets and their timing more carefully. "It's become more common that an activist shows up at a target around the same time that a target receives an acquisition proposal" than beforehand, he says. "In many of those situations, there is not a public campaign – perhaps the activist wants to apply private pressure, but not screw up the potential deal."

WHERE DO WE GO NOW?

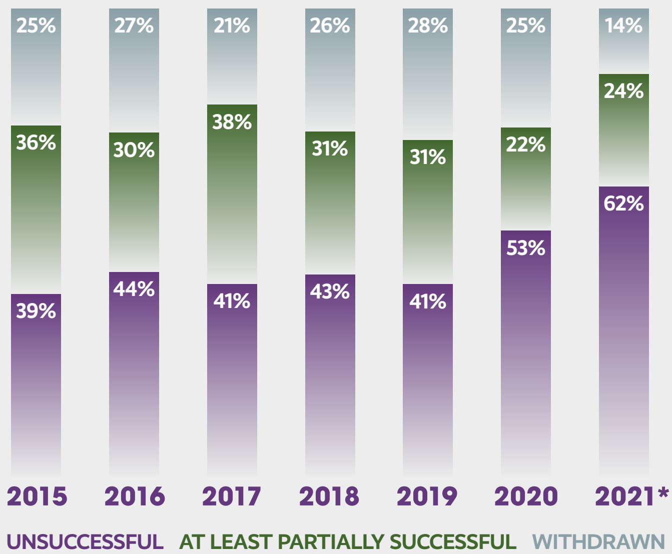
While activists are unlikely to remain "shy" about pushing for deals when there are fewer opportunities for arbitrage

GLOBAL M&A ACTIVISM SUCCESS RATE



Success rate of M&A-related public activist demands, globally.
*As of August 31, 2021.
Source: Insightia | Activist Insight Online

US M&A ACTIVISM SUCCESS RATE



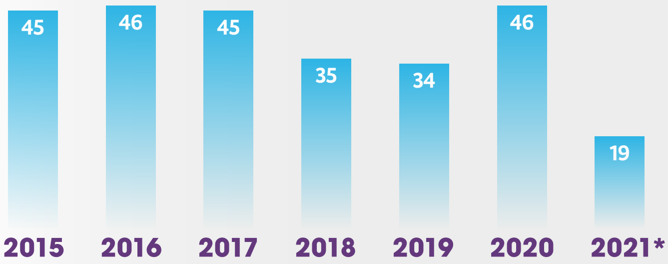
Success rate of M&A-related public activist demands at U.S.-based companies.
*As of August 31, 2021.
Source: Insightia | Activist Insight Online

and opposition, institutional investors and proxy advisers may demand a higher bar than when the practice was rife. By combining the firepower to take companies private with the incisiveness to intricately unpick existing deals, some activists are well-placed to keep up with the ever-increasing demands for more "sophistication."

Some U.S. funds may look for opportunities abroad, as Cat Rock Capital and Coast Capital have done with the U.K. The success rate of M&A demands has been lower during the pandemic in the U.S. but is picking up worldwide. Other funds will need to diversify their prescriptions to avoid looking too cynical and to gain traction at companies that lack egregious governance failings.

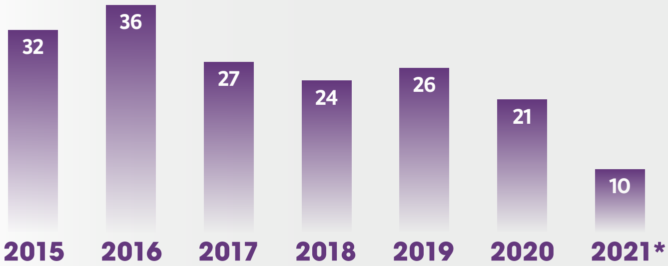
Plenty of companies will remain vulnerable to M&A long into next year, whether it is to strategic consolidators, private equity, or breakup demands. Activists themselves may need greater focus on narrow sectors to understand each company's unique dynamics and – as in operational forms of activism – perhaps some understanding of their environmental and social impact. We have yet to see a deal voted down, or even opposed, on ESG grounds. But given the growing importance of ESG in investment circles, that hardly seems far-fetched.

GLOBAL CONCURRENT BOARD REPRESENTATION AND M&A DEMANDS



Number of demands for board representation within six months of a demand to push for or oppose M&A (before or after), globally.
*As of August 31, 2021.
Source: Insightia | Activist Insight Online

US CONCURRENT BOARD REPRESENTATION AND M&A DEMANDS



Number of demands for board representation at U.S.-based companies within six months of a demand to push for or oppose M&A (before or after), globally.
*As of August 31, 2021.
Source: Insightia | Activist Insight Online

KEY TAKEAWAY: GROWTH COMPANIES SUPPORT PERPETUAL M&A ACTIVISM CAMPAIGNS.

INTELLIGENT ANALYTICS

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INTELLIGENT ANALYTICS

WHERE INTELLIGENCE MEETS ANALYSIS

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NOT RIGHT NOW

The strong M&A market that has emerged in the aftermath of the pandemic has made activist investors more circumspect about deals, writes Iuri Struta.

ROBUST dealmaking after the COVID-19 pandemic may have made activist pressure to pursue deals redundant, while at the same time providing reasons to expect better terms. Before the pandemic, pro-deal activism regularly outpaced anti-deal demands. This year, the opposite has happened. As of August 31, 47 companies have been publicly subjected to oppose M&A demands globally, per Insightia data, versus 35 during the same period last year. Meanwhile, push for M&A demands fell to 35 from 60 in the same period in 2020 and 76 in 2019.

"LONG-TERM SHAREHOLDERS WHICH HELD STOCKS THROUGH THE WORST PARTS OF THE PANDEMIC ARE ASKING WHY THEY SHOULD SELL THEM NOW, DURING A STRONG RECOVERY."

That doesn't mean activists are souring on deals entirely, but rather waiting for the right time to strike. M&A is often the eventual objective, "but might not be initially sought explicitly," Pete Michelsen, a partner at Qatalyst Partners, said in an interview for this report. Michelsen noted that many activists might not be specifically calling for strategic alternatives due to a combination of strong M&A markets (increasing the likelihood of an approach even absent a process) and uncertainty stemming from lockdowns (strategic reviews often take at least six months to complete).

CONVERGING VIEWS

Just three years ago, dedicated activists were opposing large deals on strategic grounds. Starboard Value objected to the merger of Bristol Myers Squibb and Celgene, Carl Icahn was fuming when Occidental Petroleum outbid Chevron to acquire Anadarko Petroleum, and there was some short-lived dissent from Pershing Square Capital Management and Third Point Partners to the combination between United Technologies and Raytheon. These M&A campaigns ended in failure, partly because the benefits of preventing deals are uncertain and soliciting votes against them is much harder.

The M&A activism of 2021 is more about the details, advisers say. "These days, companies and activists seem to largely reach the same conclusion on whether the company should be sold or not," Aneliya Crawford, global head of activism & defense at UBS, said in an interview for this report. "It's really more often about these marginal differences of how exactly it's done and at what price, rather than whether it should be done."

A psychological aspect might also be involved. Chris Young, global head of contested situations at Jefferies, said long-term shareholders which held stocks through the worst parts of the pandemic are asking why they should sell them now, during a strong recovery. Some asset managers might also have a so-called inventory issue, meaning they cannot fulfill

EUROPEAN M&A

While the U.S. saw a relatively high number of opposed deals, the number in Europe has already matched the record set in 2019 for the same period, driven in large part by the U.K. A relatively undervalued market and a buoyant economic recovery has prompted international acquirers to hunt for bargains but lots of local fund managers are unafraid to speak out against asset sales.

Spire Healthcare's deal to sell itself to Ramsay Healthcare was shot down by shareholders after opposition from Toscafund Asset Management and Fidelity International. The sale of supermarkets chain operator Morrisons to a consortium led by Fortress Group has stirred the public opposition of many asset managers, including Silchester International, M&G Investment and JO Hambro. American private equity firm Clayton, Dubilier & Rice (CD&R) eventually outbid Fortress, although shareholder approval was still pending at the time of writing.

> **“UNLIKE BEFORE THE PANDEMIC, BIDDERS HAVE BEEN HAPPY TO RAISE OFFERS TO PUSH DEALS THROUGH.”**

their investment mandate if a sizeable company in their investment sector is taken out of public markets, Young said.

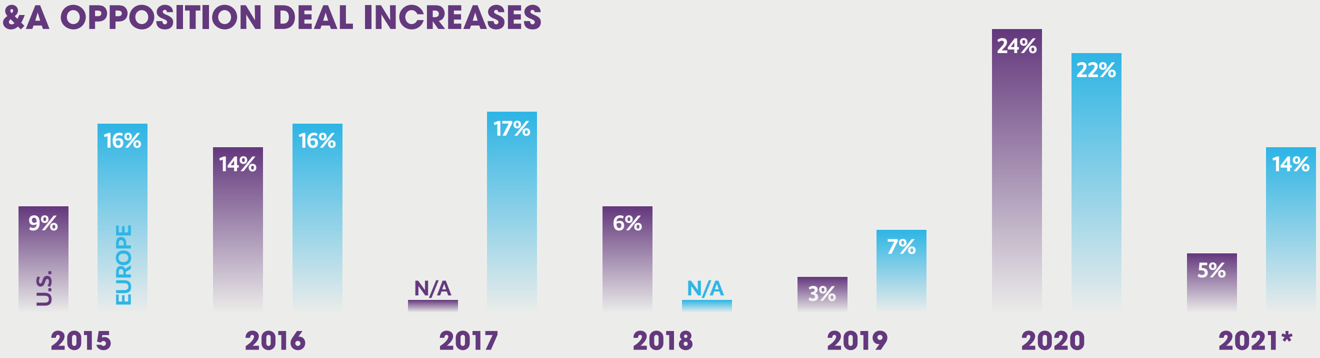
TIME IS MONEY

Most of the opposition to deals over the past two years focused on price, with demands largely placed at small- and mid-cap companies. A significant part of the opposition came from traditional investors that do not describe themselves as activists.

Whatever their activist bona fides, their timing is excellent. Unlike before the pandemic, bidders have been happy to raise offers to push deals through. According to *Activist Insight Online* data, six U.S. cash deals were amended in 2020 following activist intervention, with an average hike of 24%, the highest since at least 2015. Only four opposed cash deals in 2020 did not get a price bump compared with 14 of 19 in 2016 and nine of 13 in 2018, *Activist Insight Online* data show.

Among the “bumps” recorded in 2020, a group of acquirers raised their price for Collectors Universe by 22% following opposition from Alta Fox Capital Management and Mill Road Capital hiked its offer for Huttig Building Products by 45% after 22NW Capital objected. This year, At Home Group, Extended Stay America, and Pluralsight have received modest bumps from their acquirers after criticism from shareholders and proxy fight threats.

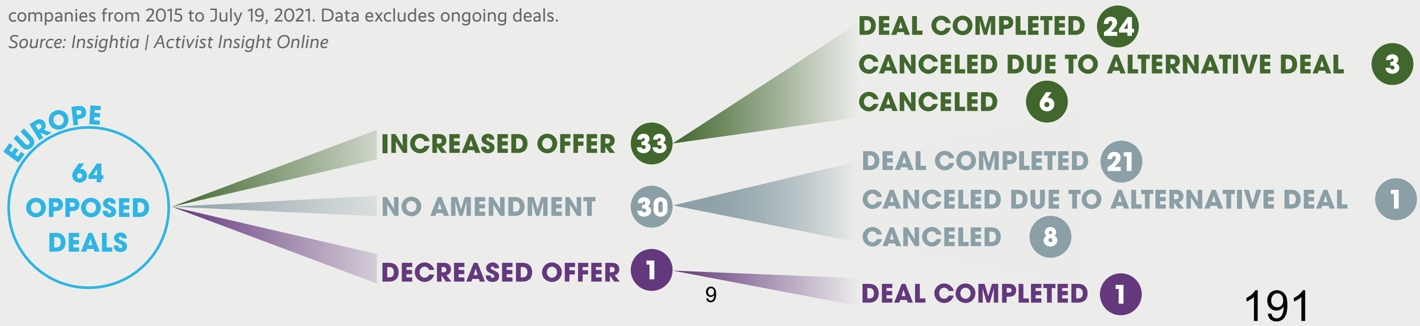
M&A OPPOSITION DEAL INCREASES



Average offer price change (%) in cash-only takeover deals opposed by activists, inclusive of offers that were not completed but were amended, exclusive of ongoing deals and any deals that did not receive a change in consideration.
*2021 as of July 19, 2021
Source: Insightia | Activist Insight Online

CASH DEAL OPPOSITION OUTCOMES

Outcome of M&A cash-only deals facing activist opposition at U.S.- and Europe-based companies from 2015 to July 19, 2021. Data excludes ongoing deals.
Source: Insightia | Activist Insight Online



FEEDING FRENZY

An interview with Lawrence Elbaum and Patrick Gadson, co-heads of Vinson & Elkins' shareholder activism practice.

WHAT IMPACT HAS COVID-19 HAD ON M&A ACTIVISM?

COVID created a very interesting landscape for M&A activism. Many companies had a lot of value eviscerated in the depths of the pandemic and have been slow to recover. These companies became natural targets for further unlock-value campaigns by activists who have been pushing those companies to sell.

We're going to see a higher incidence of M&A consolidation plays. We are also seeing a resurgence of an older phenomena of activism against M&A deals; to either vote them down or shareholders think they're entitled to a price bump, and aggressively pursue what is often called "bumpitrage."

"THERE ARE PLENTY OF AGITATORS IN AN ENVIRONMENT THAT HAS FULLY-VALUED COMPANIES SEEKING M&A AND GETTING PREMIUMS THAT ARE 20% OR BELOW."

IS THIS A GOLDEN AGE OF ANTI-DEAL ACTIVISM?

If you use the past several months to predict the future, it would be safe to say we are in a bit of a golden age of anti-deal activism. There are plenty of agitators in an environment that has fully-valued companies seeking M&A and getting premiums that are 20% or below – sometimes even in the single digits if it's an equity deal – and the activism community is seeing that this is a quick way to exert public pressure on the boards and acquirers to renegotiate those deals to save face and give more to the shareholders.

As long as the agitators are finding success with this model, we will see it more often. Anti-deal M&A doesn't necessarily involve a potential acquirer who offers a better deal or better terms than an existing offer like it did in the past; anti-deal M&A could be someone who is already in your shareholder base who doesn't like a particular deal and champions voting against that particular deal, without having another offer on the table necessarily.

There's no such thing as a cookie-cutter M&A deal – boards are well-served to prepare in this "golden age" by thinking very carefully about the governance processes they have in place for considering offers and to create bespoke, thorough, intelligent, and fair strategic review processes that are usually more defensible and likely to win proxy advisory firm and shareholder support.

WILL THE BOOM IN SPACS DISTRACT ACTIVISTS?

The short answer is no. SPACs will be on the menu, if not on the plate. SPACs, as a class, will be considered when screening for potential unlock-value campaigns, and part of that is just the structure of SPACs – a tremendous amount of capital that must be deployed around a ticking clock – so you are going to have some slip-shot capital allocation decisions toward the back-end of when that capital is going to be deployed.

However, because of the ways that SPACs are structured, a lot more activism will surface after those transactions are completed and the company has been de-SPACed – that is, it begins to look like a normal company in terms of its shareholder register.

A lot of SPACs aren't ready to become public – a lot are two kids and a clipboard in a college dorm room that are now being thrust into earnings calls. They're just not ready for prime-time – it doesn't mean that they're not going to be successful – but it creates two opportunities for activism: either the short attack angle, or disputes between the SPAC sponsors/directors and the director designees over the position of the business when the public markets don't appreciate the company they way everyone thought.

KEEP IT SIMPLE

America remains the hottest market for breakup activism, but Europe is closing in, writes Iuri Struta.

WHILE the U.S. continues to be the main playground for breakup activists, there is growing evidence that Europe is becoming the next hot market to push for leaner business models.

Between 2013 and 2016, 70 U.S. companies were publicly subjected to breakup demands by dedicated activists – the kind of activism in which shareholder agitators push companies to sell business divisions. In the following four years, just 48 U.S. companies were targeted with such demands. Meanwhile, the number in Europe increased from 17 in the four years through 2016 to 40 in the following four.

EUROPE HAS ARGUABLY BEEN SLOWER IN BREAKING UP CONGLOMERATES, GIVING ACTIVISTS AN INCREASING NUMBER OF OPENINGS."

Chris Young, the global head of contested situations at Jefferies, said in an interview for this report that the number of conglomerate-type structures in the U.S. over the past decade has declined, as shareholders pushed companies to focus on core business lines, providing fewer break-up activism opportunities for activists. Europe has arguably been slower in breaking up conglomerates, giving activists an increasing number of openings.

CHANGING LANDSCAPE

Still, a number of viable breakup candidates remain in previously-ignored U.S. industries. Until just recently, most of the breakup activity by large activists was primarily in the industrials/basic materials sector. Following pressure from a host of activists, Dow and DuPont merged in 2017 and then broke up into three. Raytheon Technologies, Emerson Electric, and United Technologies were among the industrial-oriented companies that faced breakup demands up until 2018. In Europe, Cevian Capital pushed German industrial powerhouses ThyssenKrupp and Bilfinger as well as Swiss-based ABB to streamline their structures.

In the past three years, the landscape has changed somewhat. Activists have moved to industries like the insurance, media and telecoms, and utilities sectors, both in Europe and in the U.S.

Elliott Management has been one of the most active campaigners in this area. It successfully prodded telecom giant AT&T to divest its media division Time Warner, which is now in the process of merging with peer Discovery. The activist has also pushed for streamlining several utility companies, including Sempra Energy, FirstEnergy, and now Duke Energy.

In Europe, Elliott targeted the breakups of U.K.-based travel and insurance company Saga and coffee and hotel chain Whitbread in 2019. More recently, insurers Sampo and NN Group found themselves in its sights. At pharmaceutical giant GlaxoSmithKline, the activist is watching the company's separation of its consumer and drugs and vaccine divisions closely and a handful of other targets have been rumored in just the last few weeks.

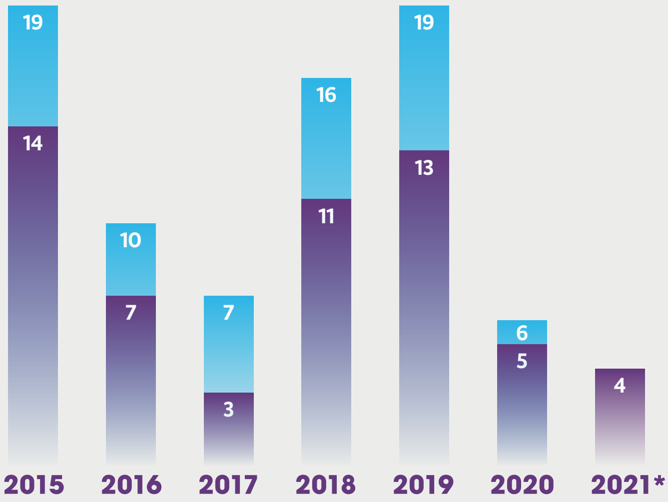
Cevian Capital is doing the same at Aviva Investors, while American activists Third Point Partners and Trian Partners have pushed for breakups at the likes of U.K.-based Prudential and Ferguson, respectively, showing a growing trend among larger activists of investing in companies where a breakup transformation plays a prominent role in the thesis.

COVID BREAKUP

The COVID-19 pandemic has put additional pressure on companies to streamline, and those that have not shown the clear benefits of holding multiple businesses together through a crisis might become vulnerable, advisers say.

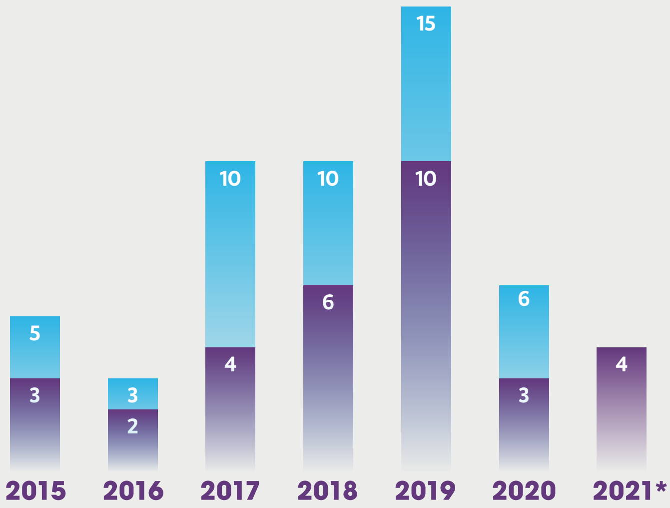
"Spinoffs are very sensible at this point," Aneliya Crawford, global head of activism & defense at UBS, said in an interview for this report. The COVID-19 pandemic has shown "which businesses truly have synergies and complementarity between them and which businesses have just built on bits and pieces and parts that don't jive together quite well."

US ACTIVIST BREAKUP TARGETS



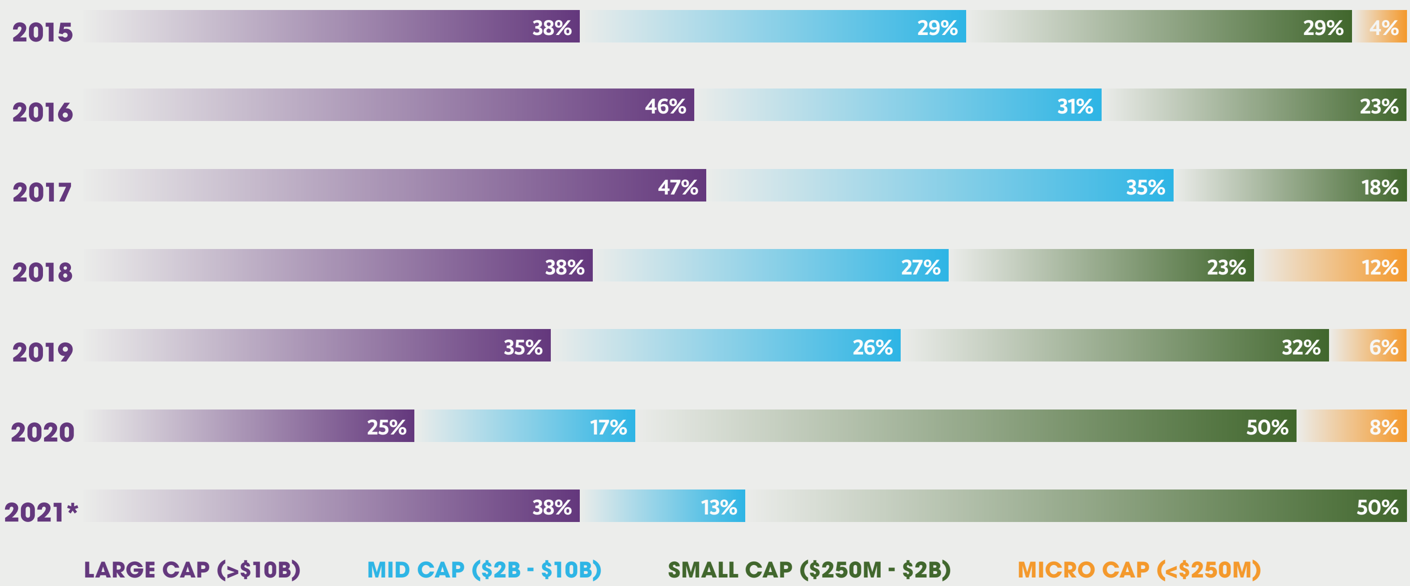
Number of U.S.-based companies publicly subjected to activist demands pushing to spin off or sell a business division by Primary- or Partial-Focused activists. (*YTD values in purple as of August 31 of each year)
Source: Insightia | Activist Insight Online

EUROPE ACTIVIST BREAKUP TARGETS



Number of Europe-based companies publicly subjected to activist demands pushing to spin off or sell a business division by Primary-or Partial-Focus activists. (*YTD values in purple as of August 31 of each year)
Source: Insightia | Activist Insight Online

US AND EUROPE ACTIVIST BREAKUP TARGETS BY MARKET CAP



Market cap breakdown of U.S.- and Europe-based companies publicly subjected to a primary- or partial-focused activist demands pushing to spin off or sell a business division.
*As of August 31, 2021.
Source: Insightia | Activist Insight Online

DOING THE TWO-STEP

An interview with Michael Verrechia, managing director in the M&A and Activism Advisory Group at Morrow Sodali.

HOW HAS THE PANDEMIC CHANGED M&A ACTIVISM?

MOST of the deals we have worked on recently have had some level of concern of shareholder activism or traditional public opposition. We have seen that opposition manifest in different forms, whether it's been a proxy contest with competing ballots, a formal "vote no" campaign supported by an activist's white paper, or simply rumors on the Street of alternative transactions that were not fully explored by a company's board. I expect the M&A arena will continue to be a focus for activists looking to squeeze additional value out of announced deals.

As a shareholder engagement and proxy solicitation firm, our main concern in the initial days of the pandemic centered around how we would effectively and directly communicate with the different shareholder constituencies. As we all saw, institutional investors easily pivoted to virtual meetings and Zoom. However, there was still concern surrounding reaching retail holders due to processing and mail delays. Those shareholders become critically important in close votes. In the end, while the mail system was incredibly behind in the onset of the shutdown, we did see a sizeable increase in retail holders willing to engage with us over the phone.

WHAT CAN A COMPANY DO WHEN SHAREHOLDERS OPPOSE AN ANNOUNCED DEAL?

As we all know, when an activist investor opposes an announced deal, it puts the shareholder engagement program and communication strategy into overdrive. Much of what needs to be discussed with shareholders revolves around the process of the target company accepting the announced deal as the "best" deal.

That said, in the past six months I have worked with opposing shareholders targeting transactions that did not result from a conflict-free sales process. One announced a transaction that did not receive unanimous support from the board of directors. Of course, at the end of the day, price ultimately drives the success of the vote and closing of the transaction; if shareholders believe they can squeeze additional value by publicly opposing the transaction, they may try to.

WHAT ARE SOME RED FLAGS THAT COULD INDICATE A DIFFICULT SOLICITATION?

Aside from immediate negative market reaction, a major warning sign is a rapidly changing shareholder base prior to a record date – the retail population can increase dramatically. Since the pandemic, we've seen this happen quite a bit in special purpose acquisition company (SPAC) deals. For some SPACs, the retail base can reach 25%-30% of the voting population which is problematic because retail holders are typically poor voters and require additional time for solicitation. In those situations, we have to be creative in deploying different strategies for maximizing the retail voting return. That means crafting an overall campaign that goes directly to the shareholders (letters, phone calls, multiple ballots) while also targeting potential voters through social media and advertising.

WHAT CAN COMPANIES DO WHEN AN ACTIVIST PUSHING FOR A SALE LAUNCHES A PROXY FIGHT?

In the past six months we have been involved in a few situations where an activist investor was looking at a two-step fight with the goal of reaching an announced deal with a higher premium. The first step is obviously to vote down the deal, with the second step being a contested election to secure representation on the board.

When a company finds itself in a proxy contest, either against a proposed deal or for board seats, it is critical to first understand the company's changing shareholder profile from a voting control perspective. Not only does a shareholder base significantly turn over post announcement of a transaction but companies typically rely on very stale public filings for information. Identifying current shareholders should be the basis for how the overall defense campaign should be run. From there, it is truly an exercise in defending your deal and why it is in the best interests of all shareholders. To that end, companies and boards should have a full team of advisers on tap who can prepare them to engage with shareholders and secure their votes.

FROM BARBARIANS TO BUYERS

As activist strategies continue to evolve across a broad range of topics, some funds are making moves to buy companies – though questions over why activists are taking up the role of buyers persists, writes John Reetun.

AS the M&A activism playbook has changed, some activists have made a more radical change, turning buyer rather than mere instigator of strategic alternatives. The rise of activist-led special purpose acquisition companies (SPACs) has also given activists a taste for buying companies, although the process of taking private companies public quickly dilutes their ownership.

"THERE'S A CERTAIN CLASS OF ACTIVISTS THAT, IF THEY WERE TO ATTEMPT SUCH A THING, WOULD HAVE A DIFFICULT TIME ESTABLISHING THEIR CREDIBILITY."

Activist takeover offers have been on the rise globally since 2016, according to data from Insightia, hitting a high in 2019 with 35 companies publicly subject to activist takeover attempts. Among primary and partial focus activists, the peak was in 2020, with 15 companies subject to attempted takeovers.

REAL DEAL?

The seriousness of some activist takeover attempts is up for debate. "There's a certain class of activists that, if they were to attempt such a thing, would have a difficult time establishing their credibility," says David Rosewater, head of Morgan Stanley's activism defense team. "But it's still tough for companies to dismiss out of hand if the activists have a real ability to demonstrate that they can come up with the required capital."

While some activists have the track record, others have the tactical nous. Elliott Management has participated in at least four take-privates since 2019. Senator Investment Group and Cannae Holdings combined a bid for CoreLogic with a proxy fight, raising their offer by a token dollar per share to show themselves open to further increases if allowed to do due diligence. Ultimately, after winning a minority slate, the two allowed other bidders to overtake their valuation and sold out at a profit. However, 40 North successfully acquired W.R.

ACTIVIST TAKEOVER TARGETS

	2015	2016	2017	2018	2019	2020	2021*
U.S.	15	15	15	18	17	18	10
ASIA	3	2	5	6	2	6	3
EUROPE	2	3	1	2	7	3	4
AUSTRALIA	2	-	4	5	6	3	3
CANADA	2	1	1	-	2	2	1
OTHER	1	1	-	-	1	1	-

Number of companies publicly subjected to activist takeover demands, by year and HQ.
*As of August 31, 2021
Source: Insightia | Activist Insight Online

"I THINK THERE CERTAINLY IS A SMALL SUBSET OF THE ACTIVIST COMMUNITY THAT IS WILLING TO OWN THESE ASSETS LONG-TERM."

Grace, having raised its bid from $60 per share to $70 per share.

A campaign to watch is unfolding at Monmouth Real Estate Investment Corp. following Blackwells' December bid. The $18 per share offer was deemed "not in the best interest" of shareholders before a strategic review sparked by the campaign led to a bidding war between a real estate investment trust Equity Commonwealth (EQC) and private equity firm Starwood Capital. EQC eventually raised its offer to $19 per share, representing a 5.5% premium to Blackwells' offer, while Starwood increased the value of its offer to $19.20 per share, a 6.6% premium. Shareholders voted down the EQC offer in September, leaving Monmouth's board floundering and Blackwells planning a proxy fight.

"I think there certainly is a small subset of the activist community that is willing to own these assets long-term, the ones that have formed internal private equity shops and actually acquired some companies," David Hunker, a principal at EY, said in an interview for this report. "That's going to remain a small set of activists because you need a lot more capital and most activists aren't operators. There's another subset that see takeover offers as a way to kickstart a process."

SPAC TO THE FUTURE

Amid the activist-led takeovers last year, activist SPACs also surged, with some funds looking for new ways to maximize value outside of the traditional playbook. Both Hudson Executive Capital and Starboard Value have completed deals, taking Talkspace and Cyxtera Technologies public this year. Sarissa Capital, Glenview Capital, and Third Point Partners have also raised money that way.

However, the boom may be facing headwinds. In recent months, Pershing Square Tontine Holdings was hit with litigation from two academics over its attempt to buy a minority stake, rather than a whole company. Founder Bill Ackman said in a letter that the outcome of the lawsuit may have a "chilling effect" on investor confidence in SPACs and could see him return $4 billion unused to his investors. Whether the appeal of SPACs, many of them less friendly to investors than Tontine, is continued may be in the hands of courts and regulators. Whatever activists do next, the past two years will have armed them with new ideas.

ACTIVIST TAKEOVER DEMAND OUTCOMES

Outcomes of primary- and partial-focus activist takeover demands, globally.
*As of August 31, 2021
Source: Insightia | Activist Insight Online

GETTING IT DONE

In light of increasing opposition from activist investors, deal defense is evolving to provide greater transparency and strategic insight, writes Jason Booth.

INITIATING M&A has traditionally been a favorite activist demand. But with COVID-19 having disrupted markets and thrown off valuations, this year has seen more campaigns opposing deals than supporting them. According to Insightia data, 47 companies have faced activist demands opposing deals this year, compared with 35 in favor, as of August 31. In the whole of 2020, there were almost 50% more targets of pro-M&A demands. And the likelihood that deals facing activist opposition will be cancelled may be on the rise. Since 2015, roughly 20% of all cash deals opposed by activists at Europe- and U.S.-based companies were cancelled. Since the start of 2020, the failure rate stands at 24%.

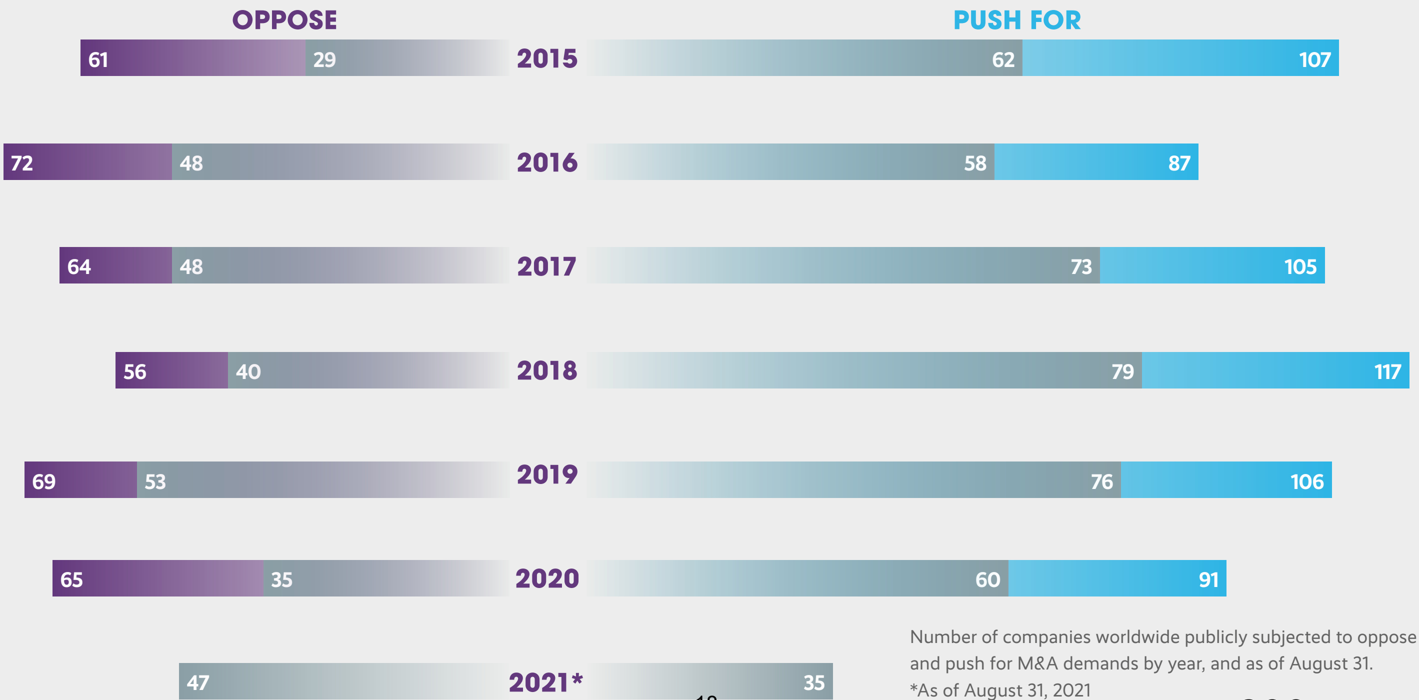
The likelihood of opposition means management needs to prepare earlier and in more detail to defend their deals. “I tell my coverage partners that given the underlying factors leading to more shareholder opposition to agreed transactions, it’s critical our clients prepare for potential blowback on even friendly deals done at solid premiums, and most importantly to be ready from the day of deal announcement to convince longer-term shareholders ‘why this deal, why now and then of course, why this valuation,’” Chris Young, global head of contested situations at Jefferies, said in an interview for this report.

PRICE IT RIGHT

Offering the right price and a willingness to sweeten the price, especially when faced with a rival bidder, has proved a critical factor in getting some deals over the line this year. After Eminence Capital opposed Vista Equity Partners’ tender offer for Pluralsight, despite a 25% premium to the stock’s 30-day volume-weighted average, the suiter boosted the offer by 11%. Despite continued activist complaints, the deal closed after 72% of shares were tendered at the higher price.

By contrast, when activist Blackwells Capital opposed Equity Commonwealth’s (EQC) deal to acquire Monmouth Real Estate Investment Corporation, at a slim 7.3% premium to its unaffected share price, the buyer was only willing to

GLOBAL ‘OPPOSE’ VERSUS ‘PUSH FOR’ M&A ACTIVISM



Number of companies worldwide publicly subjected to oppose and push for M&A demands by year, and as of August 31.
*As of August 31, 2021
Source: Insightia | Activist Insight Online

"THE PRICE IS IMPORTANT BUT IF YOU'RE NOT PACKAGING THE DEAL TERMS WITH THE LARGER STRATEGY, YOU'RE POTENTIALLY GOING TO FIND YOURSELF IN TROUBLE."

up its offer by 7.7% and was quicky outbid by rival suitor Starwood Capital. Shareholders rejected the deal, with *Proxy Insight Online* data suggesting only one U.S. merger vote has received less support since 2013.

EXPLAIN YOURSELF

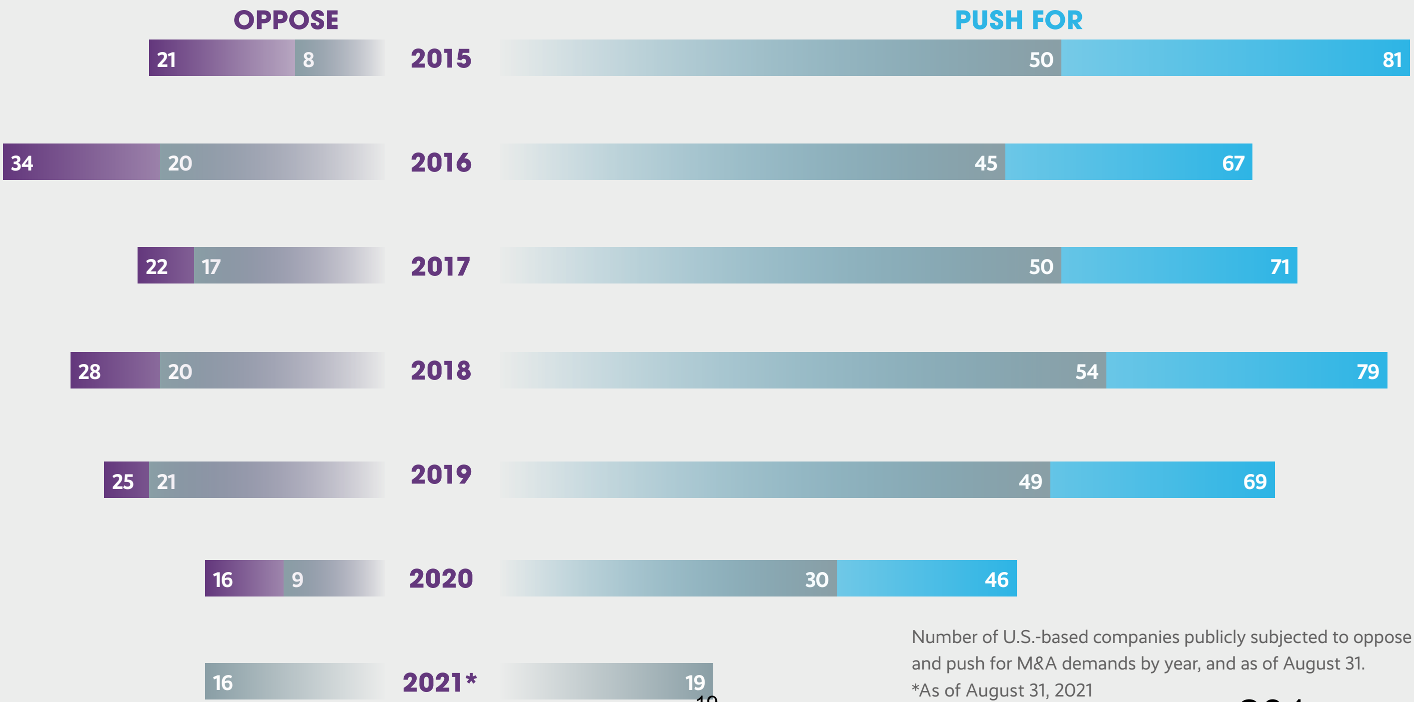
But price isn't everything. "Shareholders need and want information, they want transparency," noted David Hunker, Americas Shareholder Activism Defense Leader at EY. "The price is important but if you're not packaging the deal terms with the larger strategy, you're potentially going to find yourself in trouble."

Indeed, price was only one reason cited by Institutional Shareholder Services (ISS) when it advised shareholders to vote against the EQC Monmouth deal. "There remains substantial uncertainty that the combined company will be able to execute on the post-transaction opportunities touted by [Monmouth's] board," ISS stated in its report.

And while rival bidder Starwood and activist Blackwells both put out a steady stream of presentations and statements criticizing the deal, EQC was largely silent until a week before the vote. That left the task of defending the deal to Monmouth's board, whose efforts were undermined by activist allegations, echoed by proxy advisers, that they were unwilling to consider other offers irrespective of price.

A better recent example of being prepared to explain the virtues of a deal can be seen in Hilton Grand Vacations' defense of its $1.4 billion purchase of Diamond Resorts International in the face of opposition by activist Land & Buildings. The company responded to the activist's initial one-and-a-half-page demand letter with a 13-page PowerPoint presentation disputing each assertion in detail. And when the activist followed up with a longer presentation expanding its views, the company published a 150-page proxy statement. Land & Buildings decided against running a proxy contest and the deal subsequently received 95.6% shareholder support, according to Insightia data, indicating management's arguments had convinced most every other shareholder.

U.S. 'OPPOSE' VERSUS 'PUSH FOR' M&A ACTIVISM



Number of U.S.-based companies publicly subjected to oppose and push for M&A demands by year, and as of August 31.
*As of August 31, 2021
Source: Insightia | Activist Insight Online


insightia
INTELLIGENT ANALYTICS

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., ALAN S. ARMSTRONG, STEPHEN W. BERGSTROM, NANCY K. BUESE, STEPHEN I. CHAZEN, CHARLES I. COGUT, MICHAEL A. CREEL, VICKI L. FULLER, PETER A. RAGAUSS, SCOTT D. SHEFIELD, MURRAY D. SMITH, WILLIAM H. SPENCE, AND COMPUTERSHARE TRUST COMPANY, N.A.,	§	No. 139, 2021
	§	Court Below: Court of Chancery of the State of Delaware
Defendants Below, Appellants,	§	
v.	§	C.A. No. 2020-0707
STEPHEN WOLOSKY AND CITY OF ST. CLAIR SHORES POLICE & FIRE RETIREMENT SYSTEM,	§	
Plaintiffs Below, Appellees.	§	

Submitted: October 20, 2021
Decided: November 3, 2021

Before **SEITZ**, Chief Justice; **VALIHURA**, **VAUGHN**, **TRAYNOR** and **MONTGOMERY-REEVES**, Justices, constituting the Court *en Banc*.

ORDER

Now this 3rd day of November, 2021 having considered this matter on the briefs and oral arguments of the parties and the record below, and having concluded that the same should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its Memorandum Opinion dated February 26, 2021, its Implementing Order dated March 4, 2021, and its Final Order and Judgment dated April 23, 2021;

NOW, THEREFORE, IT IS ORDERED that the decisions of the Court of Chancery be and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Karen L. Valihura
Justice

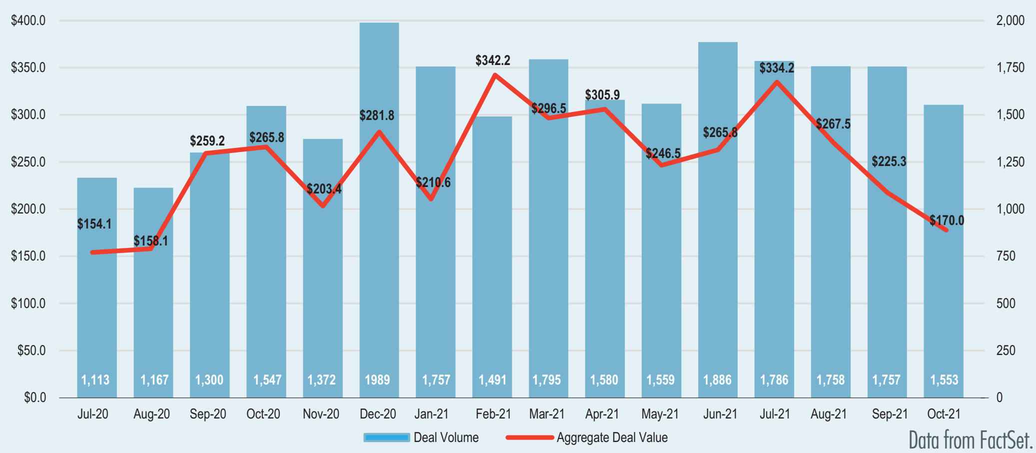
FRIED FRANK

M&A/PE Quarterly

A QUARTERLY ROUND-UP OF KEY M&A/PE DEVELOPMENTS

Notwithstanding Record M&A Deal Activity, Significant Drop-off in Deal Values in Recent Months

Monthly deal activity since July 2020, measured by volume and deal value



Data from FactSet.

While global deal activity measured by number of deals has remained at record or near-record levels throughout 2021, average deal value has declined steeply over the second half. Average deal value fell to $109.5M in October 2021, from a high of $187M in July 2021 (reflecting a month-over-month decline trend starting in August). The median P/E ratio reflected in deal values fell to15.3x earnings for the three months ending October 2021, from almost 26x for 4Q 2020. These statistics suggest a continuing very robust deal market, but possibly with a pullback from this year's record level.

Winter 2021

CONTENT

Where Things Stand at the End of 2021

Extremely high level of M&A activity. This high level of activity is being driven by a shifting of market power among companies and between industries as the effects of the pandemic are reflected; pent-up demand from a halt in activity during the pandemic; huge reserves of dry powder and available capital at low interest rates; expanded recognition, post-pandemic, of the key role of digitalization and technology for future growth, the need for stronger supply chains, and the need to address ESG and sustainability issues; some restructurings as pandemic-related government relief programs end; and pressure on SPACs (special acquisition companies—which have proliferated) to find and complete acquisitions within the timeframe required by that structure.

Continued on page 3

M&A/PE Partners

NEW YORK

Amber Banks (Meek)

Andrew J. Colosimo

Warren S. de Wied

Steven Epstein

Christopher Ewan

Arthur Fleischer, Jr.*

David J. Greenwald

Erica Jaffe

Randi Lally

Mark H. Lucas

Scott B. Luftglass

Shant P. Manoukian

Philip Richter

Steven G. Scheinfeld

Robert C. Schwenkel**

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Increase in "hostile" M&A activity. This increase, which began in late 2020, has been focused on companies that have struggled to find organic growth post-pandemic and whose share price has not recovered from pandemic-related market disruptions. Companies whose stock price has underperformed industry peers are generally more likely to be targets of acquirors (or shareholder activists. Shareholder activists' focus on M&A has continued—with "bumpitrage" campaigns in friendly deals, support for hostile bids, and an increased willingness to launch unsolicited takeover bids themselves (sometimes in partnership with a strategic or private equity buyer). Structural defensive protections continue to be out of favor. (A resurgence of sorts in poison pill adoptions at the outset of the pandemic has not continued.) Stock and option watch programs continue to be important for early indications of hostile interest.

Significant increase in antitrust enforcement, with timing issues and new focus. M&A deals now face prolonged timelines and more risk on the regulatory front—including, it appears, investigation not just of competitive overlap or risk of harm from vertical integration but also other social impacts of a proposed transaction. There has been a rapid shift to increased enforcement of the antitrust laws and, in that effort, the consideration of broader novel theories of harm to competition and/or consumer protection. In September, the new chair of the FTC stated that the agency's priorities and approaches in reviewing proposed M&A deals will differ from those in the past, with a "holistic" review of deals and a focus on the harms that "Americans are facing in their daily lives." Further, she stated that, given "the growing role of private equity and other investment vehicles," the agency will "examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations," particularly when "these abuses target marginalized communities." Over the past few months, the FTC, in some deals, has been seeking information during the second request stage of its investigations about topics such as unions, wages, the environment, corporate governance, diversity, and noncompete agreements.

Among other developments have been the following: suspension indefinitely of the early termination of the 30-day waiting period under the Hart-Scott-Rodino Antitrust Improvements Act for transactions presenting no competitive concerns; issuance of an executive order that established a whole-of-government effort for more vigorous enforcement of the antitrust laws to "take decisive action to reduce the trend of corporate consolidation"; issuance of pre-consummation warning letters informing parties that the FTC has not completed its investigation of their deal within the statutory deadlines, and that, if the parties "choose to proceed with their transaction, ... [they] are doing so at their own risk"; a notable shift in tone to emphasize more populist-type pocketbook issues (*e.g.*, practices affecting labor markets or small business operations); withdrawal by the FTC from the joint FTC/DOJ vertical merger guidelines that were issued just last year; and new policy priorities at the FTC under which the staff will consider new factors, including "how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete."

It remains to be seen whether the FTC will seek to challenge M&A transactions based not only on a conventional horizontal and vertical market-based antitrust analysis but also on broader societal impacts. In the most recent settlements and one merger challenge currently pending, the issues the FTC raised were of the traditional type rather than focusing of social impact concerns. There is also uncertainty as to the extent of changes to come at the DOJ, although the newly appointed head of antitrust at the DOJ is known as an advocate for stronger antitrust enforcement and the agency has been very active in challenging deals this year prior to his arrival.

Slowing of SPAC activity, but tremendous pressure on the demand for targets from existing SPACs. SPACs, which have been used for decades, became more popular starting in 2018-19 and their use surged starting in mid-2020. (A "SPAC"—special acquisition company—is a shell company that is formed to raise capital in an IPO, with the offering proceeds serving as a blind pool of funds held in trust to finance the acquisition of an as-yet-undetermined target; following which, the SPAC identifies a target and uses the offering proceeds to acquire it, with the target becoming public through the "de-SPAC" merger, as the target shareholders receive shares of the SPAC, and sometimes cash, as consideration.) Since the first quarter of 2021, however, there has been a significant drop-off in new SPACs being formed—although new formations are still at a high level and are slightly higher in the fourth quarter than they were in the third quarter. Most notably, the roughly 500 SPACs currently seeking to identify and complete acquisitions within the proscribed time period (usually one to two years from the SPAC's IPO) have created frenzied competition for acquisition targets. Another important development for SPACs has been significant increased regulatory and investor skepticism, relating primarily to sponsors' potential conflicts of interest inherent in the SPAC structure, allegedly rushed due diligence of targets, and a trend toward high valuation of targets. The SEC has brought several high-profile SEC enforcement actions (against SPACs, their sponsors, and target company executives); the SEC has been issuing extensive comment letters on disclosure by SPACs (focused on sponsor conflicts of interest and the disclosure of target company financial projections); and the plaintiffs' bar has begun to bring actions against SPACs.

Rebound of shareholder activism after a pause during the pandemic. The number of new activist campaigns has been fairly constant over the past several years, other than the pause that occurred during the pandemic. The most likely targets recently have been companies whose stock prices are underperforming their peers and those hardest-hit by the pandemic; however, there have been some carry-over campaigns focused on pre-pandemic issues. High-cap companies continue to be less likely to be targeted by activists, but 20% of new campaigns in 2021 were against companies with capitalization of $25 billion or more. The ranks of activists has thinned, with a core group of well-established activists accounting for most of the campaigns. These activists have extraordinary access to capital and can acquire significant equity stakes (even in very large companies) with speed and, often, stealth. Leading activist funds have been diversifying their investment strategy—for example, Elliott Management formed private equity funds which have led or participated in buyouts targeted in Elliott's activist campaigns.

The influence of shareholder activists in M&A transactions has continued. Activists continue publicly to oppose announced deals to seek to influence an increase in the offer price ("bumpitrage") and to support hostile bids; now often work together, or are supported by hedge funds in "wolfpacks"; and have shown an increased willingness themselves to launch unsolicited takeover bids (sometimes in partnership with a strategic or private equity buyer). Thus, advance preparation for activist involvement, as part of the planning for an M&A deal, is critical. In addition to campaigns for board seats (which themselves almost always have a more specific, underlying value proposition), other recent areas of pressure have included board composition issues relating to diversity, tenure, overboarding, conflicts, and low share ownership. Notably, activist nominees to boards increasingly have been independent directors with industry or corporate governance experience rather than the activist's insiders. Also, there has been a focus on ESG and Corporate Social Responsibility (CSR) issues, led by a new breed of activist funds that are focusing solely on these issues.

The trend in recent years of more cooperation between companies and activists, after an activist approach, has continued—leading to more and relatively quick settlements of campaigns (often, with the target company accepting a small number of the activist's nominees onto its board). Finally, we note that the *Williams* decision issued by the Court of Chancery and affirmed by the Delaware Supreme Court, raises questions about the validity of poison pills adopted to thwart the threat of shareholder activism when there is not an "actual threat" against the company. As we interpret the court's opinion, however, the Williams pill would not have been invalidated but for, first, the "extreme" terms (including a 5% trigger and a very broad "wolfpack"/acting-in-concert provision, and, second, the record that reflected a flawed board process in adopting the pill. (*See* the article below, *Questions About Poison Pills After the Delaware Supreme Court Upholds the Invalidity of the Williams Pill*.)

Continued expanded access to corporate books and records under Section 220 demands. Shareholders' Section 220 demands to inspect corporate books and records most often arise in the context of efforts to obtain information, prior to closing an M&A transaction, for use in post-closing litigation to support damages claims and/or to establish that *Corwin* is inapplicable as a defense. Plaintiffs have been more successful in crafting claims that survive dismissal at the pleading stage—sometimes based on word-by-word comparison by the court of board minutes or other corporate records and the company's deal disclosure. The trend generally has been for the court, in certain circumstances, to permit broader access to emails than in prior years. Accordingly, it continues to be important that directors and managers are made aware, and constantly reminded, of the need for extreme care with respect to the content of emails (and other communications). Also, notably, in a recent Delaware decision (*Boeing*), the Court of Chancery stated that, if the minutes of a board meeting do not reflect that a topic (in that case, airplane safety) was discussed at the meeting, then it was reasonable for the court to infer at the pleading stage of litigation that the board did not discuss that topic at the meeting.

M&A litigation judicial developments.

- **Continued judicial acceptance of the new "fraud-on-the-board" theory of potential liability for directors, officers and advisors.** Under this theory, there is potential liability for having concealed material information from the board, even if without bad faith (or any underlying fiduciary breach). The Delaware Court of Chancery has expressly endorsed the theory in a number of recent decisions (*Presidio*, *Columbia Pipeline*, *Mindbody*).
- **Continued judicial retrenchment of the *Corwin* doctrine—with focus on disclosure flaws.** *Corwin* provides for business judgment review of challenged transactions in post-closing litigation for damages, so long as the transaction was approved by the shareholders in a "fully-informed and uncoerced" vote. The courts no longer "automatically" find *Corwin* applicable where a transaction has been shareholder-approved. Rather, the court in numerous cases has determined that Corwin was inapplicable because the shareholder vote was not "fully-informed" due to disclosure issues. *Corwin* remains a potent defense tool, however—thus, adequate disclosure (particularly of potential conflicts and process flaws) is critical.
- **Possibly expanded potential for aiding and abetting liability (of buyers and advisors) in connection with a sale process.** In two recent cases (*Columbia Pipeline* and *Mindbody*), the Court of Chancery found, at the pleading stage, that the buyer might have aiding and abetting liability for the target's alleged fiduciary breaches in (i) favoring the buyer in the sale process and/or (ii) not disclosing material information in the merger proxy statement. With respect to the issue of favoring the bidder, in both cases the court emphasized that, based on the plaintiffs' allegations, it was reasonably conceivable that the buyer knew about the favoritism *and* took advantage of it. With respect to the issue of inadequate disclosure, in both cases the merger agreement (as is usual) entitled the buyer to review the proxy statement and required that the buyer notify the target of known deficiencies. The court emphasized in one case (*Columbia Pipeline*) that it was relying on a "constellation" of allegations that, *taken together*, supported a reasonable inference that the buyer knew that the proxy failed to disclose certain material information. However, in the other case (*Mindbody*), the court relied on an apparently *less extensive* set of allegations. The court concluded, at the pleading stage, that it was reasonably conceivable that the buyer knew that the merger proxy did not disclose material information relating to dealings the buyer itself had during the sale process with the target's CEO-Chairman. More notably, the court also concluded that the target may not have disclosed certain potentially material information (its preliminary quarterly revenue results) due to "concerns" about disclosing those results that were expressed by the buyer's attorneys when the target asked the buyer for its comments on a draft press release disclosing the results (that was to be incorporated by reference in the proxy). These decisions underscore, again, the critical importance of a very careful approach to disclosure. Further, importantly, *Mindbody* suggests that participants in the merger process (including the buyer—as

well as, potentially, for example, advisors) who suggest deletion of, or even express concern about, disclosure in a draft document may face the risk of aiding and abetting liability if a court later finds that the omitted information was material and should have been disclosed.

- **Increased targeting of officers in deal litigation.** Unlike directors, officers are not protected from by exculpation provisions in a company's charter. Therefore, they may have liability even without having acted in bad faith (and even if claims against directors for the same conduct have been dismissed). In addition, the court recently has suggested that officers may have liability not just for breaches of fiduciary duties they owe to the corporation and its shareholders, but for breaches of their duties as agents of the board—that is, duties to follow the board's directives and to provide the board with information it needs to carry out its duties (*AmeriSource Bergen*, which has been affirmed by the Delaware Supreme Court). As discussed above, plaintiffs have been successful in a few recent cases in having their claims against target company officers for favoring a bidder in a sale process survive the pleading stage of litigation (*e.g.*, *Columbia Pipeline* and *Mindbody*). There also have been more cases in which claims against officers for gross negligence in preparation of proxy statements have survived the pleading stage (based on the officer having been involved in the preparation of the proxy and/or having signed it).

- **Continued diminished importance of appraisal (in arm's-length third-party transactions).** Delaware courts now routinely rely on deal-price-less-synergies to determine appraised "fair value" in arm's-length third-party transactions (even in the context of a somewhat flawed sale process). Appraisal claims have dropped precipitously in recent years, given the likelihood of an at-or-below-the-deal-price appraisal result for arm's-length transactions. The expected increase in appraisal cases due to uncertainty of valuations during the pandemic materialized only very modestly (with a slight increase in appraisal filings in 2020 from 2019, but still fewer filings than in 2018, which itself reflected a steep dropoff from the prior years). However, appraisal remains relevant in non-arm's-length transactions (such as take-privates).

  Another appraisal-related development of note is that the Delaware Supreme Court confirmed that holders of common stock can contractually agree in advance to waive the right under the Delaware appraisal statute (DGCL Section 262) to seek appraisal of their shares—at least if the stockholders were sophisticated and informed, represented by counsel, had bargaining power, and voluntarily agreed to the waiver in exchange for valuable consideration. While prior Delaware decisions had established that appraisal rights can be waived in advance with respect to preferred stock (such stock being by nature a product of contract), the courts had not previously addressed the issue specifically with respect to common stock (*Manti v. Authentix*). Finally, the Court of Chancery, in one case (*Regal Entertainment*), although relying on the deal-price-less-synergies, based on the requirement that fair value be determined as of the effective time of the merger, found that fair value was *above* the deal price. That result flowed from the increase in value of the company between signing and closing attributable to the passage of the 2017 Tax Cut and Jobs Act that reduced the company's tax rate from 35% to 21%.

Merger agreement developments.

- **Regulatory.** In light of heightened regulatory risk, merger agreements have contained regulatory-related provisions that are more highly tailored to the individual circumstances—including more detailed and specific provisions as to the standard of efforts (rather than simply a "reasonable" or "best" efforts standard), longer "end" dates, and more detailed reverse termination fees.

- **MAC conditions and ordinary course covenants.** Since the emergence of the pandemic, there has been more focus on material adverse change provisions and interim operating covenants. In the two decisions issued by the Delaware courts addressing whether the pandemic constituted a basis on which a buyer was excused from closing a pending merger agreement (*AB Stable* and *Snow Phipps*), the Court of Chancery held that the pandemic was not a MAC because the parties' definition of a MAC in the agreement excluded "calamities" and "natural disasters," which terms, the court concluded, encompassed the concept of a pandemic. (There is still only one case ever in which a Delaware court found that there was a MAC that excused the buyer from closing.) In *AB Stable*, the court held, further, however, that the buyer did *not* have to close because the target company's *responses* to the pandemic (although perfectly reasonable) constituted a breach of its covenant to operate only in the ordinary course of business pending closing. The court rejected an interpretation of the covenant to mean ordinary course in the context of the pandemic; and held, instead, that, unless the parties expressly provide otherwise, it means ordinary course during ordinary, "normal times." The court took the same analytic approach in *Snow Phipps*, but reached a different result (i.e., the buyer was obligated to close) given the different facts. In Snow Phipps, the target's responses to the pandemic were "*de minimis*" and were equivalent to how the company had operated previously during times of revenue declines. Merger parties should consider whether the interim covenant should provide some flexibility to the target to respond to extraordinary events that may occur between signing and closing.

- **Representations and warranties.** R&W insurance continues to be prevalent. With more competition for attractive acquisition targets, the insurance package terms are now sometimes pre-arranged by the target company. Also, there has been continued attention to cybersecurity and "MeToo" issues in due diligence and the representations and warranties.

- **Earnouts.** There has been some increased focus on earnouts to bridge valuation gaps arising from pandemic-related uncertainty. Recent earnout cases underscore that earnouts often lead to post-closing disputes, and ultimately litigation, over the earnout itself. In seeking to avoid later disputes, it is critical that the parties set forth in the merger agreement clear, specific, business-contextualized provisions and procedures with respect to calculation of the earnout and the parties' respective earnout-related obligations. Recent studies indicate that earnouts are used in over 60% of private company acquisitions in the life sciences industry (where the payments usually are tied to the occurrence of specific steps in the regulatory process relating to the development and marketing of the target company's product); in roughly 23-30% of other private company acquisitions (where the payments typically are based on the achievement of specified levels of revenue or EBITDA); and in almost half of de-SPAC transactions (mergers with a SPAC acquiror).

- **Judicial interpretation of merger agreements.** Delaware decisions continue to highlight the courts' strict approach in looking to the "plain language" of agreements and refusing to "read in" terms that are not expressly and clearly stated by the parties in their agreement. These decisions reaffirm the need for clear, precise drafting of merger agreements—with special attention to the interrelationships among the provisions.

Corporate governance developments.

- **Build Back Better legislation.** The legislation is still being analyzed but promises to affect corporate America in numerous, significant ways. Of immediate note, the law's new surcharges on corporate stock buybacks and on very high income individuals will affect various companies.

- **Stockholder engagement.** Institutional investors continue to be more involved and vocal. Expanded, thoughtful engagement with institutions (including by directors at times) has continued. Boards should ensure that an effective shareholder engagement plan is in effect, that market concerns relating to the company are being monitored, and that the company is implementing an effective communications plan that is responsive to the concerns.

- **Strong focus on ESG and CSR issues.** Regulators, institutional investors, retail investors, and the media have maintained a strong emphasis on environmental-social-governance (ESG) issues and Corporate Social Responsibility (CSR) issues. There has been continued increased focus on these issues in board rooms. We note that, with increased interest in these issues, proxy statements are more often read by non-shareholder stakeholders and the media (increasing the risk of "cancel culture" issues arising). New SEC guidance recently issued has reduced significantly the likelihood of shareholder proposals on social issues being excludable under the "ordinary course" and "economic relevance" exceptions to the requirements for inclusion of shareholder proposals in proxy statements (under Rule 14-8).

Questions About Poison Pills After the Delaware Supreme Court Upholds the Invalidity of the Williams Pill

On November 3, 2021, in *The Williams Cos. Inc. v. Wolosky,* the Delaware Supreme Court affirmed the Court of Chancery's seminal decision earlier this year that invalidated the poison pill adopted by the board of The Williams Cos. Inc. In a brief *en banc* ruling, the Supreme Court, without elaboration, stated that it was affirming the Court of Chancery's ruling "on the basis of and for the reasons" set forth in then-Vice Chancellor (now-Chancellor) Kathaleen S. McCormick's opinion.

In the first half of 2020, when the COVID-19 pandemic was emerging in full force in the U.S., there was a surge in the adoption of poison pills as many companies saw their stock prices plummet and there was extreme market uncertainty. (Almost all of these pills have now expired without being extended; and poison pill adoptions have returned to their low, pre-pandemic levels.) Williams, an oil pipeline company, adopted its pill in March 2020 when its stock price was cratering due to the pandemic as well as a world-wide oversupply of oil. The independent board's stated purpose in adopting the pill was to ward off the potential of shareholder activist activity that could take advantage of company's collapsed stock price during a time of enormous market volatility. Certain Williams stockholders challenged the board's adoption of the pill, and the Court of Chancery enjoined the company's use of the pill.

The Court of Chancery's decision raised numerous questions that the Supreme Court's brief ruling does not resolve. While some interpreted the lower court's decision as casting doubt on the validity of pills generally except when adopted as a response to an actual, specific threat of hostile activity against the company, we note that the Chancellor's opinion emphasized the "unprecedented" nature of the terms of the Williams pill. Most notably, the pill had a 5% trigger (instead of the usual trigger in the range of 10-20% in the context of an antitakeover threat). In addition, the pill had an unusually broad definition of beneficial ownership, an unusually broad acting-in-concert ("wolfpack") provision, and an unusually narrow exclusion for passive investors. This combination of features, the Chancellor wrote, was more "extreme" than any pill the court had previously reviewed. The court stressed that the terms were so broad (in particular, with respect to the acting-in-concert provision) as to impinge on the stockholders' fundamental right to communicate with each other and the company in ordinary ways. Moreover, with respect to the "purely hypothetical" nature of the threat to the company, we would note that there apparently was no corroboration that the board had actually identified even a general threat. For example, the board did not establish a record that it had explored what activists had done in the past in similar market circumstances, had obtained and considered the counsel of its financial advisors with respect to activist activity in this context, had considered the company's own past experience (or other similar companies' experience) with respect to activists in similar contexts, and/or had identified what positions or comments activists had previously taken or made relating to their opportunities and intentions in similar contexts.

Williams clearly establishes that the court will not sustain the validity of a pill with extreme terms that is adopted by a board that has not established a record substantiating a determination of a threat to the company from shareholder activism. It remains uncertain, however, to what extent a wholly non-specific threat to the company would be viewed as sufficient by the court in the context of a board that *had* more specifically considered the potential threat. It also is uncertain to what extent, even in the face of a purely hypothetical threat, a pill with typical, market (rather than "extreme") terms would be validated by the court. In addition, the question remains to what extent the court, in the face of an actual and specific threat to the company, would accept a pill with "extreme" terms. It is also unclear whether the court would apply the same analysis in the context of a pill directed against hostile takeover activity rather than shareholder activism.

New SEC Guidance, Reversing Precedent, Will Limit Companies' Ability To Exclude Environmental and Other Social Policy-Related Shareholder Proposals

On November 3, 2021, the staff of the Division of Corporation Finance at the SEC (the "Staff") issued a Staff Legal Bulletin (SLB No. 14L) to provide new guidance with respect to public companies' requests for no-action letters seeking relief to exclude shareholder proposals submitted to them under SEC Rule 14a-8. As a result of the new guidance, it is unlikely that shareholder proposals on social policy topics will be excluded on the basis of the "ordinary business" or "economic relevance" exceptions to Rule 14a-8. The guidance is consistent with the general position the SEC Commissioners have articulated in support of investors' focus in recent years on environmental and social-policy ("E&S") issues.

We note that investors have reached new heights in their attention to and support of E&S issues, including in the shareholder proposal context. In the 2021 proxy season, there were more shareholder proposals on E&S topics than on all governance- and (non-E&S) compensation-related topics combined. In addition, the number of E&S proposals receiving majority support roughly doubled in the 2021 season as compared to 2020. The most common topics were climate change, compensation parity for women, human capital, and board and workplace diversity. Large institutional investors have been increasingly willing to support shareholder proposals (for example, Blackrock supported over one-third of shareholder proposals in the 2021 proxy season, as compared to under 20% in the 2020 proxy season); and, moreover, have been increasingly willing to vote against directors at portfolio companies where ESG management is perceived as inadequate. We note, also, that shareholder activists now more often engage in the shareholder proposal process rather than focusing only on board seat challenges.

Rule 14a-8 requires companies that are subject to the federal proxy rules to include shareholder proposals in their proxy statements proposals, subject to certain procedural and substantive requirements. The "ordinary business" exception (subsection (i)(7) under Rule 14a-8) provides that a proposal may be excluded if it "deals with a matter relating to the company's ordinary course business operations." The "economic relevance" exception (subsection (i)(5) under Rule 14a-8) provides that a proposal may be excluded if it "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business." The new guidance in SLB 14L expressly rescinds the Staff's years-long precedent under SLBs 14I, 14J and 14K relating to these exceptions—and makes it much more unlikely that a shareholder proposal on an E&S topic would be viewed by the Staff as excludable under these exceptions. Indeed, in the new SLB, the Staff confirms that, going forward, many proposals that previously would have been excludable under these exceptions now would not be excluded.

More specifically, the new SLB provides as follows:

- ***"Ordinary Business Operation" Exception—"Significant Social Policy" Issues.*** Where a social policy issue is the subject of a shareholder proposal, the Staff will no longer focus on determining the nexus between the issue and the company, but instead will focus on the whether the issue has "social policy significance." In other words, the Staff will look to whether the proposal raises issues with "a broad societal impact such that they transcend the ordinary business of the company," regardless of whether the issue relates to an important social policy *of the company*. Due to elimination of the company-specific approach to evaluating the significance of a policy issue for purposes of this exception, the Staff will no longer expect analysis from the board on this issue to determine whether the proposal is excludable.

- ***"Ordinary Business Operation" Exception—"Micromanagement."*** Where a shareholder proposal seeks detail or to promote specific timeframes or methods, the Staff will not view the proposals as *per se* constituting micromanagement. Instead, the Staff now "will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." Further, the Staff will "expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input." The Staff also notes in the SLB that, in considering whether a proposal's matter is too complex for shareholders, as a group, to make an informed judgment, the Staff will look to the sophistication of investors generally, the availability of data, and the robustness of public discussion. The Staff noted that, although it recently denied ConocoPhillips' request for no-action relief to exclude a shareholder proposal requesting that the company set targets covering the greenhouse gas emissions of the company's operations and products, going forward it would not exclude such a proposal as it did not impose a specific method for setting the targets and instead "afforded discretion to management as to how to achieve such goals."

- ***"Economic Relevance" Exception.*** Going forward, "proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds [of this exception]." As a result of this new guidance, the Staff will no longer require board analysis for consideration of a no-action letter request under this exception.

- ***Additional New Guidance.*** (i) *Use of Graphics.* The SLB clarifies that shareholder proposals may include graphs, images and graphics—but that exclusion of proposals may be appropriate where graphs or images would make a proposal materially false or misleading or inherently vague; would directly or indirectly impugn character, integrity or personal reputation; or are irrelevant to a consideration of the subject matter of the proposal. The SLB also clarifies that the words in graphics count towards the 500- word limit for proposals. (The SLB does not address practical issues relating to the permissible size, placement, or color for any graphics.) (ii) *Proof of Ownership Letters.* The SLB clarifies that no specific format is required for proof of a proponent's continuous ownership of a company's securities and that brokers are not required to (*i.e.,* the shareholder proposal proponent now can) calculate and present to the issuer the share valuation. In addition, the SLB notes that companies should identity any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the proponent's proof of ownership, if the deficiency notice did not identify specific defects. (iii) *Use of e-mail.* Where a controversy develops as to whether an email was timely delivered, the burden will be on the sending party to show proof of receipt. The SLB suggests that, when email is used to communicate between a shareholder proposal proponent and the company, to prove delivery of an email for purposes of Rule 14a-8, the sender should seek a reply email from the recipient in which the recipient acknowledges receipt of the email. The SLB also encourages parties to acknowledge receipt of such emails when so requested.

Chancery Decision Underscores Risks to Dissident Stockholders of Not Submitting Advance Notice Director Nominations Well in Advance of the Deadline—Rosenbaum v. CytoDyn

Rosenbaum v. CytoDyn Inc. (Oct. 13, 2021) involved the rejection by CytoDyn Inc.'s board of directors of the notice of director nominations submitted by dissident stockholders under the corporation's advance notice bylaw. The dissidents submitted the notice the day before the deadline under the bylaw. The board, having identified deficiencies in the notice, did not seek additional information from the dissidents and, a month after the notice was submitted, informed the dissidents that the notice was rejected. The dissidents promptly submitted a supplement to its notice and supplemented its proxy materials, but, the court stated, "the effort came too late." The court wrote: "The fundamental nature of the omissions, and the 'eve of' timing of the Nomination Notice's submissions, [left] no room for…equitable principles to override the decision by the Board to reject the Nomination Notice."

The court indicated that *Blasius* enhanced scrutiny review could apply to nomination notice disputes—but the court held *Blasius* did not apply here as there was no "manipulative conduct" by the board. The plaintiffs argued that denial of the advance notice presented the "classic scenario" for enhanced scrutiny review under *Blasius*, as the board was "act[ing] for the primary purpose of preventing the effectiveness of a shareholder vote." Therefore, they contended, under *Blasius*, the board had to prove it had a "compelling justification" for rejecting the notice. CytoDyn asserted that the issue was a contractual one, as the bylaws are a contract between the corporation and its stockholders, and the dissidents clearly did not comply with all of the requirements of the advance notice bylaw. CytoDyn pointed to the Delaware Supreme Court's *BlackStone v. Saba* opinion, which stressed that advance notice bylaws are to be interpreted using contractual principles. In that case, the Supreme Court explained that "Delaware law will protect shareholders in instances where there is manipulative conduct or where the electoral machinery is applied inequitably," but the Supreme Court declined to apply heightened scrutiny as it found no manipulative conduct. In *CytoDyn*, similarly, Vice Chancellor Glasscock held that enhanced scrutiny under *Blasius* was "not justified" because the CytoDyn board did not act manipulatively. The Vice Chancellor noted that the advance notice bylaw had been adopted on a "clear day" years before the plaintiffs submitted their nomination notice. Also, there was evidence that the plaintiffs were aware of and understood the bylaw and, indeed, had "parsed it carefully" before submitting the nomination notice. While the board "was not as responsive as perhaps it should have been," and faced the same inherent conflicts that incumbent boards generally have, there was "no evidence that [the board] engaged in manipulative conduct in its dealings with the plaintiffs."

The court emphasized that the notice was submitted close to the deadline, leaving no time to address deficiencies. Where the plaintiffs "went wrong," the Vice Chancellor stated, was "by playing fast and loose in their responses to key inquiries embedded in the advance notice bylaw," and then by submitting the notice at the deadline, leaving no time to fix any deficiencies the board might identify.

The court found that the dissidents' notice was "clearly" deficient. In particular, the court noted, the plaintiffs were obligated by the bylaw to disclose who was "supporting" their efforts. The plaintiffs "chose to disclose nothing" regarding their supporters, although this was "vital information" and the plaintiffs had "focused" on this requirement and "emphasized it to others" in the dissident group before submitting the notice. Specifically, the notice "failed to disclose the existence of CCTV, which was founded by Rosenbaum (the plaintiff, and one of the nominees) and collected donations to support the [dissidents'] proxy fight." The plaintiffs argued, first, that CCTV and its funders were not "supporters" because the donations were made before a candidate slate was identified and the donators were free to support whomever they wished as directors. The court found that that response disingenuously suggested that the dissidents had no support or funding for their proxy campaign. The plaintiffs also argued that the board should have sought the information if it viewed its absence as a material omission. The court stated that, as the plaintiffs had "provided no information on the subject, there was no basis for the Board to seek supplementation."

The court also pointed to the bylaw requirement to provide information regarding potential conflicts. CytoDyn had previously considered acquiring IncellDx, a company controlled by Rosenbaum. The court stated that "a reasonable stockholder would want to know that certain of Plaintiffs' nominees were tied to a past proposal whereby CytoDyn would acquire IncellDx for $350 million" and that they "may seek to facilitate a renewed proposal along the same lines...." The court stated that this conclusion was particularly so given that such a transaction likely would not be subject to a shareholder vote and could be approved by the board unilaterally. The plaintiffs contended that none of the nominees had any intent to propose revisiting an acquisition of IncellDx. The court responded that the CytoDyn board "legitimately suspected" that they might and "was correct in expecting" that they would disclose the past failed attempt and their current intentions one way or the other. Moreover, the court noted, there was some evidence that revisiting the transaction was "at least being contemplated by the IncellDx insiders and Rosenbaum."

Other Decisions and Developments of Interest This Quarter

Drafting Guidance for Earnouts—*Pacira* and *Shire*. In both *Pacira v. Fortis* (Oct. 25, 2021) and *Shire v. Shareholder Representative Services* (Oct. 12, 2021), the Delaware Court of Chancery, based on the "plain meaning" of the express language in the merger agreement at issue, rejected the buyer's argument that an earnout payment was not due. The *Pacira* decision indicates that buyers should seek to set forth specific restrictions on the selling stockholders with respect to any post-closing actions to influence achievement of an earnout. The *Shire* decision highlights that the drafting of an earnout (or any other) provision should clarify whether the phrase "as a result of" does or does not mean *exclusively* as a result of. See **here** our Briefing, *Important Earnout/Milestone Drafting Points Arising from Recent* Pacira *and* Shire *Decisions.*

General Partner Had Unexculpated Liability for Its Reliance on Its Outside Counsel's "Contrived" Legal Opinion—*Bandera v. Boardwalk Pipeline*. In *Bandera v. Boardwalk Pipeline* (Nov. 12, 2021), the Court of Chancery found, in a post-trial decision, that, in connection with the take-private of a master limited partnership by its general partner, the general partner wrongly relied on a flawed legal opinion that, according to the court, was "contrived" to reach the result the general partner's controller wanted. The Vice Chancellor found that the general partner and the controller were not exculpated from liability because their efforts to obtain the opinion constituted "willful misconduct." The court awarded the limited partners more than $690 million in damages. See **here** our Briefing, *Court of Chancery Awards $690M+ in Damages based on Controller's Reliance on Outside Counsel's "Contrived" Legal Opinion.*

Settlement Is Reached in *Boeing*'s *Caremark* Litigation. *The Boeing Company Derivative Litigation* (Sept. 7, 2021) was another in a series of cases in recent years in which the Delaware Court of Chancery refused to dismiss, at the pleading stage, *Caremark* claims against a company's independent directors for an alleged failure to have adequately overseen management of the company's core risks. These decisions raise the question whether Caremark claims are still, as the court still characterizes them, "among the most difficult of claims to please successfully." In *Boeing*, the directors allegedly overlooked airplane safety issues, resulting in two airplane crashes. All of the people on board the two airplanes died. The company was assessed significant fines and suffered severe reputational damage. It has been reported that, in October, Boeing's shareholders and the company, with the consent of Boeing's insurers, have proposed a payment of $237.5 million to settle the case, subject to court approval. If approved, this would be the largest monetary settlement ever paid in a *Caremark* case in Delaware. (The plaintiffs have indicated that they also will be seeking almost $30 million for attorneys' fees.) The settlement agreement also provides for Boeing to create an ombudsman program, for at least five years, under which employees could raise work-related concerns, and to add to its board a director who has experience in aerospace and aviation management and product safety oversight. The settlement does not release Boeing from claims pending against it in two federal securities actions relating to the same events. See **here** our Briefing, Boeing *Decision Continues Delaware's Recent Trend Rejecting Early Dismissal of Claims Against Directors for Inadequate Oversight of Critical Risks.*

Second Circuit Denies Rehearing of Decision that Financial Advisors' Success Fees May Have Constituted a Constructive Fraudulent Conveyance—*Tribune Co. Fraudulent Transfer Litig.* The Tribune Company declared bankruptcy less than a year after completing a 2007 LBO. Among other claims made by the Trustee in Bankruptcy, claims were made against two of Tribune's financial advisors for alleged constructive fraudulent conveyance in connection with the receipt by each of them of a $12.5 million "success" fee after consummation of the LBO. The District Court had dismissed these claims, but the Second Circuit reversed in a decision issued in August 2021. In an order issued by an *en banc* panel on October 7, 2021, the Second Circuit has now denied the Trustee's petition for a rehearing of the August 2021 decision.

The District Court held in its August decision that Tribune incurred the debt for the success fees when the advisors' engagement letters were signed, which was years before the LBO. Therefore, in the District Court's view, the fees were an unavoidable antecedent debt. The Second Circuit disagreed, however, holding instead that, because the engagement letters called for the fees to be paid upon consummation of the LBO, the debt was not incurred or owed until the LBO was consummated. In addition, the Second Circuit found that dismissal of the claims at the pleading stage was "premature" because there were possible factual issues relating to whether the two advisors had provided "reasonably equivalent value" for the success fees. The engagement letters required the advisors to provide "customary and appropriate" services. The plaintiffs alleged that the two firms knew that the projections relied on by a third firm that rendered a solvency opinion were not an accurate forecast, yet did not inform the third firm or Tribune's board. Although it was a "close call," the Second Circuit decided that the claims could not be dismissed without resolution of the factual issues as to whether the advisors "failed to fulfill their responsibilities as gatekeepers retained to objectively analyze the LBO." With respect to claims made against two other financial firms engaged by Tribune in connection with the LBO (one of which provided the solvency opinion and the other of which provided a fairness opinion), Second Circuit upheld the District Court's dismissal of constructive fraudulent conveyance claims. The Second Circuit reasoned that these two other firms' fees were not tied to consummation of the LBO and were due and paid before the first step of the LBO (*i.e.*, before Tribune was insolvent).

Corporation Could Not Rely on Its Stock Ledger to Reject a Books and Records Inspection Demand When It Knew the Plaintiff Was a Stockholder—*Knott v. Telepathy Labs.* In *Knott Partners L.P. v. Telepathy Labs, Inc.* (Nov. 23, 2021), the Delaware Court of Chancery confirmed that, in general, a corporation may rely on its stock ledger to determine whether a person is entitled, under DGCL Section 220, to make a demand to inspect the corporate books and records. However, in this case, the court stated, where Knott Partners L.P., which made the demand, was not on the stock ledger, the corporation was *not* entitled to rely on the ledger to reject the demand as the corporation "was aware of the status" of Knott Partners…as a stockholder, but failed to acknowledge that fact on its stock ledger." The court would not permit the corporation to "rely on [its] deficient stock ledger to achieve a dismissal" in the statutory summary proceeding under Section 220 to "forc[e] [Knotts] into the position of submitting extrinsic evidence of [its] stockholder status…." Vice Chancellor Glasscock emphasized that the decision is limited to the "narrow circumstances" presented in this "unusual case."

New SEC Rule Amendments Will Eliminate the Key Requirements Just Recently Imposed on Proxy Advisory Firms. Proxy advisory firms (the most well-known of which are ISS and Glass Lewis) advise institutional investors regarding upcoming shareholder votes. For almost two decades, the SEC has been considering new approaches to the regulatory regime applicable to these firms. On November 17, 2021, the SEC issued proposed new rule amendments that would eliminate the key requirements it imposed on proxy firms in July 2020—namely, that proxy advisory firms have to (i) provide the company facing the shareholder vote (the subject company) with the guidance they provide to clients and (ii) make the subject company's response available to their clients.

New SEC Rule Requires Use of Universal Proxy Card in Election Contests. On November 17, 2021, the SEC adopted amendments to the proxy rules to require the use of universal proxy cards in contested director election. The amendments apply to shareholder meetings held after August 31, 2022. The new rules require both the company and the dissident to list on the proxy card it sends to shareholders *all* duly nominated director candidates (*i.e.*, its own nominees, the other's nominees, and any proxy access nominees). The universal proxy card permits shareholders to vote for any combination of these candidates (rather than having to vote for nominees only on the company's slate or only on the dissident's slate). Companies had generally been opposed to a requirement for universal proxy cards based on a concern that it would make it easier for shareholders to support dissident nominees. Among the other requirements in the new rules is that director nominees must consent to being named in any proxy statement relating to the shareholder meeting at which directors will be elected. Accordingly, companies should consider changes that may be needed to their advance notice bylaws, proxy access bylaws, and director questionnaires to ensure that the requisite consent to be named is provided.

Delaware Supreme Court Holds, Based on Agreement Language, Post-Closing True-Up Had to be Calculated "Correctly" Rather Than "Consistently"—*Golden Rule v. SRS.* In *Golden Rule Financial Corporation v. Shareholder Representative Services LLC* (Dec. 3, 2021), the merger agreement provided for an increase in the purchase price if Tangible Net Worth at closing was more than $52 million, and a reduction in the price if it was less. The calculation was to be made using the "Accounting Principles [(as defined in the agreement)], consistently applied." The Accounting Principles included that Tangible Net Worth would take into account the effect of "ASC 606" (which at that time was a new accounting principle that companies were not yet required to adopt under GAAP). When applied correctly, ASC 606 resulted in Tangible Net Worth being more than $52 million (requiring the buyer to pay more); but calculated as both parties had been doing (albeit incorrectly) since before executing the merger agreement, Tangible Net Worth was less than $52 million (requiring a price reduction). After the seller discovered the mistake, the buyer argued that ASC 606 should be applied *correctly*. The seller argued that the Accounting Principles were to be "consistently applied" (including as applied to determine the $52 million target). The Court of Chancery emphasized that the plain language of the agreement required that ASC 606 be used to determine the Tangible Net Worth true-up (and did not require or represent that it had been used to determine the $52 million target). The court would not second-guess the plain language, Vice Chancellor Fioravanti stated. The court distinguished the 2017 *Chicago Bridge* decision on the basis that, in that case, the agreement "lent itself as being interpreted as demanding consistency across all relevant time frames." For example, in the *Chicago Bridge* agreement, the seller represented that the company's pre-signing financial statements had been prepared in compliance with the same accounting principles, consistently applied, as would be used to calculate the post-closing true-up. On appeal, the Delaware Supreme Court upheld the Court of Chancery decision.

M&A/PE Quarterly

2021 FOURTH QUARTER HIGHLIGHTS

McAfee Acquistion

Counsel to a buyer consortium including Permira, Advent International Corporation, Crosspoint Capital Partners, Canada Pension Plan Investment Board, GIC Private Limited, and a wholly owned subsidiary of the Abu Dhabi Investment Authority, in the US$14 billion acquisition of McAfee Corporation.

Wafra Inc.

Counsel to Wafra Inc., an investor in Oak Hill Advisors, in Oak Hill's US$4.2billion announced sale to T. Rowe Price.

RedBall Acquisition Corp.

Counsel to RedBall Acquisition Corp. in its definitive business combination agreement with SeatGeek, with the intention of taking SeatGeek public at an initial enterprise value of approximately US$1.35billion.

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