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Activist Directors: The Evolution of Hedge Fund Activism in the S&P 500

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The prevailing rhetoric associated with hedge fund activism is almost universally negative. This Article provides new evidence of activist hedge fund behavior that contradicts this dominant narrative. The principal argument of the Article is that the conventional picture of hedge fund activism requires updating to account for the phenomenon of activist board representation.

This Article makes two general contributions to academic and policy debates on hedge fund activism. First, it analyzes original, hand-collected data on all activist hedge fund campaigns at S&P 500 companies from 2010 to 2019. Currently, there is continued reliance on empirical studies of hedge fund activism that originate from the mid-2000s. However, hedge fund activism has evolved considerably over the past twenty years since these studies were published. Activist hedge funds now increasingly target America's largest companies—the S&P 500. An analysis of such campaigns has never before been seen in the literature. The study therefore contributes up-to-date insights on the activist campaigns most likely to have an outsized impact on companies, the economy, stakeholders, and society. Second, it demonstrates that a relatively new form of activism—activist board representation—manifests very differently to traditional perceptions of hedge fund activism. Now the most common campaign strategy, the appointment of activist directors can have a positive impact on target companies. In particular, activists seeking board seats often propose changes to corporate strategy and operations. This signifies a longer-term approach to substantive value creation, rather than the short-term financial engineering that activist hedge funds are commonly criticized for engaging in. The striking differences observed in campaigns where activist directors are sought, versus those campaigns where they are not, prompts some necessary reflection of the pervasive critiques of hedge fund activism.

ARTICLE CONTENTS

INTRODUCTION	525
I. ACTIVIST HEDGE FUNDS AND SHORT-TERMISM	529
A. THE NARRATIVE OF SHORT-TERMISM	529
B. BEYOND THE NARRATIVE: ACTIVIST HEDGE FUNDS AND SHORT-TERMISM.....	535
II. ACTIVIST BOARD REPRESENTATION	541
A. THE EVOLUTION OF HEDGE FUND ACTIVISM	541
B. RESEARCH QUESTIONS AND HYPOTHESES	543
III. ACTIVIST BOARD REPRESENTATION: AN EMPIRICAL STUDY.....	562
A. SAMPLE CONSTRUCTION AND DATA DESCRIPTION.....	562
B. DATA ANALYSIS	573
C. DISCUSSION AND IMPLICATIONS	608
CONCLUSION.....	614
APPENDIX.....	614



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INTRODUCTION

“Who Bleeds When the Wolves Bite?” asked Leo Strine Jr., former Chief Justice of the Delaware Supreme Court, in his 2017 Yale Law Journal article critiquing the impact of activist hedge funds on human investors.¹ The prevailing rhetoric associated with activist hedge funds is almost universally negative. Vivid imagery of “Wall Street ‘wolf packs’ hunting down companies to close and jobs to eliminate”² depicts hedge fund activists as a destructive force in corporate governance. Activist hedge funds are accused of “attacking” companies, and their strategies are described as “edgy practices, accounting gimmickry, or never-ending cycles of spin-offs and mergers.”³ Overall, the picture presented is that activist hedge funds promote short-termism to the detriment of long-term sustainable value creation at the companies they target.

However, many cases of hedge fund activism do not neatly fit this caricature. An example is Starboard Value’s proxy contest at Darden Restaurants in 2014. Here, Starboard presented a 294-page slide deck explaining in intricate detail how the activist hedge fund planned to execute a turnaround of the company.⁴ The proposals largely focused on strategy and operations rather than resembling the short-term financial wizardry that activist hedge funds are commonly criticized for engaging in.⁵ Similarly, an activist campaign by Trian Partners at Procter & Gamble (“P&G”) in 2017

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¹ 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, 1874 (2017) [hereinafter *Who Bleeds*].

² MARK J. ROE, MISSING THE TARGET: WHY STOCK MARKET SHORT-TERMISM IS NOT THE PROBLEM 5 (2022) [hereinafter ROE, MISSING THE TARGET].

³ *Who Bleeds*, *supra* note 1, at 1874.

⁴ STARBOARD VALUE, TRANSFORMING DARDEN RESTAURANTS (2014), http://www.shareholderforum.com/dri/Library/20140911_Starboard-presentation.pdf.

⁵ *Id.* at 5.

involved the hedge fund presenting a ninety-three-page white paper detailing the shortcomings of P&G's corporate strategy.⁶ Uniquely, Martin Lipton, a vocal opponent of the campaign strategies of activist hedge funds, praised Trian's approach, noting that Trian's campaign sought to "promote long-term investment and growth."⁷

There are countless other examples of activist hedge funds presenting extremely detailed proposals to corporate management and the broader shareholder base which articulate in impressive depth the perceived flaws in the strategy and operations of target companies. These campaign tactics thus focus on substantive value creation rather than personifying the types of financial engineering that activist hedge funds are typically accused of. What else was different about these campaigns? In each of these campaigns, the activist hedge fund sought board representation. In the case of Darden, the strength of Starboard's proposal and the widespread dissatisfaction of other investors with the incumbent management led to a historic and unprecedented victory where the activist hedge fund succeeded in replacing the entire board of Darden with their own director nominees.⁸ At P&G, Trian's founder Nelson Peltz also joined the board, despite narrowly losing his proxy fight.⁹ These cases were outliers where activist campaigns proceeded to a full shareholder vote to determine whether activist hedge fund nominee(s) should join the board.¹⁰ However, there are many other cases at very large companies where activist hedge funds sought and secured minority representation on the target company board, either for one of their own managers or for carefully chosen non-affiliated independent directors. Anecdotal evidence therefore suggests that the campaigns seeking board representation generally also involve the activist hedge funds putting forward detailed proposals on strategy and operations, rather than demanding quick returns to shareholders, such as dividends or share buybacks.

Hedge fund activism differs from activism by traditional institutional investors in several fundamental ways. Kahan and Rock have noted that such activism usually entails significant changes "to specific aspects of a company's business or management (such as share buy-backs, spin-offs,

⁶ TRIAN PARTNERS, REVITALIZE P&G TOGETHER 3 (2017), <https://trianpartners.com/wp-content/uploads/2017/01/Trian-PG-White-Paper-9.6.17-1.pdf>.

⁷ Martin Lipton, *The Trian/P&G Proxy Contest*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 11, 2017), <https://corpgov.law.harvard.edu/2017/09/11/the-trianpg-proxy-contest/>.

⁸ Stephen Foley, *Starboard Sweeps away Entire Darden Board*, FIN. TIMES (Oct. 10, 2014), <https://www.ft.com/content/1be89158-5086-11e4-9822-00144feab7de>.

⁹ Siddharth Cavale, *P&G Appoints Peltz to Board Despite Losing Proxy Battle*, REUTERS (Dec. 16, 2017, 5:39 AM), <https://www.reuters.com/article/business/pg-appoints-peltz-to-board-despite-losing-proxy-battle-idUSKBN1E92ZA/>.

¹⁰ Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. FIN. ECON. 1, 6 (2020) [hereinafter *Dancing with Activists*].

mergers, or the composition of the board of directors),”¹¹ higher costs,¹² and is characterized as “strategic and ex ante.”¹³ Hedge funds could hold great promise as active shareholders, but their tactics are critiqued for being infamously short-termist. Could activist board representation be associated with more beneficial forms of hedge fund activism rather than embodying the short-term financial engineering narrative that plagues activist hedge funds? This Article explores the question of whether the conventional portrayal of hedge fund activism requires updating to account for the phenomenon of activist board representation. Are activist hedge fund campaigns for board representation different in fundamental ways from campaigns that do not seek board representation? Should this particular form of hedge fund activism be encouraged rather than discouraged? While early activist hedge fund campaigns may have focused primarily on financial or balance sheet activism, it is investigated whether activist board representation has become a strategy of choice in the United States, especially among the largest companies and the most formidable activist hedge funds.

This Article contributes to multiple central debates in corporate governance and makes several important contributions to these academic and policy debates, as follows. This Article fills a gap in the literature by analyzing very recent cases of hedge fund activism at Standard & Poor’s (“S&P”) 500 companies. A study of activist campaigns at such large companies has not been seen in the literature before. I contribute a hand-collected dataset covering all activist hedge fund campaigns at S&P 500 companies from 2010 to 2019. The data presents original, up-to-date, empirical evidence of activist campaigns at the most economically and socially significant companies in the United States. Hedge fund activism is a fast-moving phenomenon and even very recent academic scholarship on hedge fund activism contains caveats due to a reliance on empirical studies which analyze hedge fund activism only until the mid-2000s.¹⁴ The lack of an up-to-date study of activist campaigns at large companies has also led some scholars to downplay the potential impact of activist hedge funds due to assumptions that their campaigns primarily target smaller companies.¹⁵ The new data that is analyzed in this Article can help to avoid such caveats

¹¹ Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1029, 1034, 1043–44 (2007).

¹² *Id.* at 1066.

¹³ *Id.* at 1069.

¹⁴ See *infra* Part III.A.1.i.; 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, 581 (2016) (noting that “all of these studies end generally no later than hedge fund interventions initiated in 2007”).

¹⁵ See *infra* Part III.A.1.ii.; BRIAN R. CHEFFINS, *THE PUBLIC COMPANY TRANSFORMED* 372 (2018) (“Gilson and Gordon likely overestimate the clout of activist hedge funds, which is significant but has been compromised from a governance perspective by the continued bias in favor of targeting smaller companies . . .”).

being necessary in future academic scholarship as well as more generally contributing recent evidence to aid policy debates on hedge fund activism. Moreover, by focusing specifically on the largest companies and the most high-profile activist hedge funds, the study enables a precise evaluation of the actors that are most likely to have an outsized impact on stakeholders and society. The dataset therefore makes a significant contribution to understanding of recent activist hedge fund campaigns at large companies in the United States.

This Article is also the first empirical study to provide an in-depth comparison of activist hedge fund board representation campaigns with non-board level campaigns at S&P 500 companies, thus shedding light on what is now the most common form of hedge fund activism. A key contribution of this Article is to demonstrate that activist campaigns for board representation manifest differently from activist campaigns that do not involve a request for board representation. First, in terms of investment horizon, the average duration of activist board representation campaigns is significantly longer than the average duration of non-board level campaigns (approaching an average duration of four years, when the activist secures at least one board seat, compared with an average duration of nineteen months for non-board level campaigns).¹⁶ This permits an analysis of this form of hedge fund activism against the pervasive narrative of short-termism. The capital commitment involved in activist board representation campaigns is also much larger. In terms of campaign objectives, it is uncommon for activist hedge funds to engage in strategic and operational activism without also requesting at least one board seat. There is, therefore, a strong association between activist board representation and the activists seeking strategic and operational change. Activist hedge funds are also much more likely to campaign for, and succeed in, removing the Chief Executive Officer (“CEO”) when they secure representation on a target company’s board. At forty-six percent of S&P 500 companies where activists were successful in securing board seats, the CEO stood down within one year of the board seat(s) being granted.¹⁷ For non-board level campaigns, only thirteen percent of CEOs exited within one year of activist involvement, which more closely resembles baseline CEO turnover.¹⁸ Overall, an analysis of the striking differences in the campaigns when activist hedge funds pursue board representation, versus those campaigns where they do not, contributes new evidence of activist hedge fund behavior that contradicts current, dominant narratives. Perhaps most importantly, the analysis demonstrates that activist board representation campaigns tend to involve a longer-term approach to value creation through strategic and operational changes, rather than the short-term financial engineering that activist hedge funds are commonly criticized for.

¹⁶ See *infra* Part III.B.2.ii; see also *infra* Table 4.

¹⁷ See *infra* Chart 16.

¹⁸ See *infra* Chart 16.

This Article is organized as follows. Part I discusses short-termism, which is the most dominant critique of hedge fund activism. It explores the power of the short-termism narrative, and how activist hedge funds have largely failed in countering this narrative with their own competing account of management excess and waste. Part II introduces the phenomenon of activist hedge fund board representation and presents a theory and hypotheses on the potential value that might be associated with this type of activism. The theoretical discussion focuses on several key research questions that inform the empirical study that follows. Part III tests the hypotheses presented in the preceding Part II through an empirical study analyzing activist board representation campaigns at S&P 500 companies between 2010 and 2019. The empirical study analyzes 228 activist-target event pairs at 165 distinct S&P 500 companies during the ten-year period. Part IV concludes.

I. ACTIVIST HEDGE FUNDS AND SHORT-TERMISM

A. *The Narrative of Short-Termism*

Most discussions of hedge fund activism tend to be framed negatively—situating activism as a threat the board needs to defend itself against—rather than gleaning any positive insights from activist hedge fund campaigns. For example, Stevelman and Haan note that “activist hedge funds represent a trenchant, destabilizing force in contemporary governance.”¹⁹ Of all the criticisms of hedge fund activism, the “sharpest and most comprehensive criticism” is that it “exacerbates an already serious problem of ‘short-termism’ in the executive suite.”²⁰

Given the assumption, and repeated assertion, that hedge fund activism is necessarily short-termist,²¹ there is barely any discussion on whether different forms of activism accurately fit this common description. More

¹⁹ Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, U. PA. J. BUS. L. 179, 202 (2020) [hereinafter *Information Governance*] (citing literature discussing the likely deleterious effects of activist campaigns and noting that “[i]n their attempts to alter corporate financial or operating affairs in order to capture a greater, immediate surplus, activist hedge funds represent a trenchant, destabilizing force in contemporary governance”).

²⁰ Kahan & Rock, *supra* note 11, at 1083.

²¹ *Id.* (describing activist hedge funds as coming close to being the “archetypal short-term investor” and noting that “[s]hort-termism may thus pervade much that hedge funds do”); *Who Bleeds, supra* note 1, at 1874, 1907; Martin Lipton, *Important Questions About Activist Hedge Funds*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 9, 2013), <https://corpgov.law.harvard.edu/2013/03/09/important-questions-about-activist-hedge-funds/> [hereinafter Lipton, *Important Questions*]; William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 658–59, 710–11 (2010); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564 (2006) (“[T]he hedge fund is likely to favor policies by the firms in which it invests that produce short-term gains, even if a more patient investment orientation would generate higher returns over the long term.”); Coffee & Palia, *supra* note 14, at 548 (describing the academic support for the theme of activist hedge funds having an “excessively short-term orientation”).

specifically, what has been overlooked in the literature to date is an analysis of forms of hedge fund activism that may manifest differently from the traditional portrayal. The fact that this piece of the debate is missing from the literature may be in part due to the narrative of short-termism pervading an analysis of hedge fund activism. This often reduces any meaningful discussion on hedge fund activism in the press, in politics, and sometimes even in academic literature, to generalized statements about the short-term nature of such funds and their activism. Roe and Shapira outline that the “narrative is simple: stock traders and shareholder activists, looking for a quick profit, systematically induce large public corporations to manage for the short-run.”²² Not only is the narrative simple; it is also powerful. Roe and Shapira note that “[a]mong policymakers, the media, and executives, the consensus is that the short-termism problem is widespread and pernicious—and getting worse.”²³

This pervasive belief in the detrimental effects of short-term hedge fund activism can impair a genuine and thorough analysis of any positive impact that such activism may have, and stifle discussion on what might be learned from recent phenomena such as hedge fund appointed activist directors. Moreover, while it is acknowledged that there may undoubtedly be cases of “bad activism,”²⁴ this should not preclude serious discussion on the positive attributes of activist campaigns or an analysis of whether some forms of hedge fund activism may actually be more socially beneficial than others.

1. *The Power of the Short-Termism Narrative*

The problem of stock market short-termism has generally been accepted in politics, in the media, and by the public. Roe notes that the “fear that stock-market-driven short-termism is seriously harming the US economy is pervasive”²⁵ and that “[s]tock-market-driven short-termism is the rare corporate structural issue that both resonates with the public and has a place in political rhetoric.”²⁶ Roe had noted in the 1990s that “the rhetoric of anti-short-termism, like the rhetoric of patriotism, is simple and widely supported.”²⁷ This seems to be even more true today. The imagery associated with the role that activist hedge funds play as destructive short-term actors is equally powerful and prevalent. Routinely attacked for their perceived short-term focus, activist hedge funds have been termed “hit-and-run

²² Mark J. Roe & Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 HARV. BUS. L. REV. 233, 234, 271–72 (2021).

²³ *Id.* at 234.

²⁴ The phrase “bad activist” is used in recent commentaries on hedge fund activism. See Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 498 (2018).

²⁵ ROE, MISSING THE TARGET, *supra* note 2, at 2.

²⁶ *Id.* at 3.

²⁷ MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 243 (1994).

activists” by Hillary Clinton.²⁸ A German politician also described activist hedge funds as “swarms of locusts that fall on companies, stripping them bare before moving on.”²⁹ Other vocal critics such as Martin Lipton have described activist hedge funds as “preying” on corporations³⁰ and exacerbating short-termism, which he describes as a “disease that infects American business.”³¹ Indeed, as Gilson and Gordon point out, “[a]ctivism battles often are cast as the struggle by management to pursue long-term strategies in the face of pressure to maximize in the short term.”³² The phrases most often used portray activists as aggressors and their interventions as adversarial. For example, commentators talk about activist “attacks” and boards of directors are encouraged by their advisers to “forestall an attack” and be ready to “defend vigorously.”³³ Moreover, there is vivid imagery of “Wall Street ‘wolf packs’ hunting down companies to close and jobs to eliminate.”³⁴ Roe and Shapira explore the role of narrative power, noting that the combination of short-termism’s “negatives [being] easily stated, easily understood, and regularly repeated” boosts its narrative power and popularity.³⁵

2. *The War of the Narratives*

Studying actual activist hedge fund campaigns reveals a competing narrative, similar to the “*anti*-managerial narrative” that was popular during

²⁸ Brandon Kochkodin & Caleb Melby, *Hillary Clinton Faults “Hit-and-Run” Activist Investors*, BLOOMBERG (July 24, 2015), <https://www.bloomberg.com/news/articles/2015-07-24/hillary-clinton-faults-activist-investors-hit-and-run-tactics>.

²⁹ *Locust, Pocus*, ECONOMIST (May 5, 2005), <https://www.economist.com/node/3935994> (quoting the comments of Franz Müntefering, former Chairman of the Social Democratic Party in Germany, who also argued that the associated profit-maximizing strategies of activist funds were a long-term threat to democracy).

³⁰ Lipton, *Important Questions*, *supra* note 21 (“In what can only be considered a form of extortion, activist hedge funds are preying on American corporations to create short-term increases in the market price of their stock at the expense of long-term value.”).

³¹ Martin Lipton, Jay W. Lorsch & Theodore N. Mirvis, *The Proposed “Shareholder Bill of Rights Act of 2009,”* HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2009), <https://corpgov.law.harvard.edu/2009/05/12/the-proposed-shareholder-bill-of-rights-act-of-2009/> (“Short-termism is a disease that infects American business and distorts management and boardroom judgment. But it does not originate in the boardroom. It is bred in the trading rooms of the hedge funds”); see Anna L. Christie, *The New Hedge Fund Activism: Activist Directors and the Market for Corporate Quasi-Control*, 19 J. CORP. L. STUD. 1, 1–2 (“Other vocal critics describe hedge funds as ‘preying’ on companies and exacerbating short-termism, which is described as a ‘disease that affects American business.’”).

³² Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 BUS. LAW. 351, 358 (2019) [hereinafter *Board 3.0: An Introduction*].

³³ Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1154 n.131 (2015) (citing Martin Lipton & Sabastian V. Niles, *Dealing with Activist Hedge Funds*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 21, 2013), <https://corpgov.law.harvard.edu/2013/11/21/dealing-with-activist-hedge-funds-2/>; Alan M. Klein, *Shareholder Activism in M&A Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 26, 2014), <https://corpgov.law.harvard.edu/2014/02/26/shareholder-activism-in-ma-transactions/>).

³⁴ ROE, *MISSING THE TARGET*, *supra* note 2, at 5.

³⁵ Roe & Shapira, *supra* note 22, at 235.

the 1980s deal decade.³⁶ Roe and Shapira describe this as “lazy executives protecting their fiefdoms with ‘poison pills’ and ‘greenmail’ (a cousin, presumably, of blackmail) to unjustly enrich themselves (sometimes with ‘golden parachutes’) and run down corporate America at workers’ and the economy’s expense.”³⁷ Attempts to promote a similar anti-managerial narrative—which is reflective of the agency problems of stealing and shirking—can be seen from the statements made by some hedge fund activists in their campaigns over the years. For example, Daniel Loeb, of the activist hedge fund Third Point, is well known for his “poison-pen letters” to corporate executives. In 2005, he addressed the CEO of Star Gas Partners, stating “[i]t is time for you to step down from your role as CEO and director so that you can do what you do best: retreat to your waterfront mansion in the Hamptons where you can play tennis and hobnob with your fellow socialites.”³⁸ He also highlighted corporate perks in another letter to the CEO of Intercept in 2004, criticizing the CEO for “tooling around in a luxurious business jet, possibly sipping Cristal champagne cocktails at shareholder expense.”³⁹ More recently, during his campaign at Sotheby’s in 2013, Loeb noted that “Sotheby’s senior management feasted on organic delicacies and imbibed vintage wines at a cost to shareholders of multiple hundreds of thousands of dollars.”⁴⁰ Other activist hedge fund managers have used similar tactics and language. David Einhorn of Greenlight Capital entitled his investor presentation at The St. Joe Company in 2010 “Field of Schemes,” while accusing the company of “not accurately accounting for the value of its assets.”⁴¹ Carl Icahn has similarly critiqued CEOs and boards as evidenced in his campaign at Motorola in 2008, where he argued “[i]t is essential to the future of Motorola that its directors realize that the *board*, especially at this precarious time, is *not a country club or a fraternity . . .*”⁴²

Despite the vivid language used by activist hedge funds to conjure images of managerial stealing or shirking, it does not seem that activist hedge funds won the war of the narratives. Roe and Shapira have noted that a narrative of “executives at public companies entrenching themselves for power, prestige, and pay at the expense of share-holders, employees, and society overall” is “perhaps equally compelling.”⁴³ Yet the short-termism

³⁶ *Id.* at 274.

³⁷ *Id.*

³⁸ Lina Saigol, *... Yours Truly, Dan Loeb*, FIN. TIMES (Oct. 3, 2013), <https://www.ft.com/content/908e63c4-2c20-11e3-8b20-00144feab7de>.

³⁹ *Id.*

⁴⁰ Samantha Sharf, *Poison Pens: 7 of the Best Barbs from Activist Investors*, FORBES (Sept. 29, 2014, 8:39 AM), <https://www.forbes.com/sites/samanthasharf/2014/09/29/poison-pens-7-of-the-best-barbs-from-activist-investors/?sh=273c48647cf9>.

⁴¹ *Id.*

⁴² Matteo Tonello, *The Activism of Carl Icahn and Bill Ackman*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 29, 2014), <https://corpgov.law.harvard.edu/2014/05/29/the-activism-of-carl-icahn-and-bill-ackman/> (emphasis altered).

⁴³ Roe & Shapira, *supra* note 22, at 275.

narrative is much more widespread and popular. When similar anti-managerial narratives were used during the deal decade, corporate law-making nevertheless “shifted first to disciplining greedy, underperforming executives and then to blocking their opponents, the greedy raiders.”⁴⁴ Since then, the short-termism rhetoric has prevailed, despite raiders reinventing themselves into more palatable activist or engaged shareholders.⁴⁵ Beyond that, the narrative of short-termism has strengthened in power over the decades that followed.⁴⁶ Indeed, this narrative has potentially gained even more power due to the fact that short-termism has been viewed as a cause of the global financial crisis, and as a contributing factor to the global climate crisis.

3. *Increasing Narrative Power: ESG*

The short-termism problem increased in visibility during and after the global financial crisis. Some commentators have argued that it was pressure from activist shareholders that was “directly responsible for the short-termist fixation that led to the [2008–2009] financial crises.”⁴⁷ The most important issues facing society, such as the climate crisis and other environmental damage, are also increasingly presented as problems of short-termism. In short, it is argued that governments and corporations have put economic growth or short-term profits ahead of the long-term preservation of the planet. For example, at the World Economic Forum in Davos in 2023, the climate activist Greta Thunberg accused the political and business elite of “prioritizing self-greed, corporate greed and short-term economic profits above people and above planet.”⁴⁸ Statements like this have resulted in the short-termism narrative gaining even more traction and power in recent years, as it is fueled by rightful anger regarding environmental and social harm. Roe explains that “[b]roader social and economic reasons help to explain why stock market short-termism is seen as seriously pernicious”⁴⁹ The narrative has become part of the Environmental, Social, and Governance (ESG) movement, as it is “intertwined in public rhetoric with

⁴⁴ *Id.* at 274.

⁴⁵ *But see generally* Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 *YALE L.J.* 411, 415 (2022) (arguing that the conventional wisdom about corporate raiders and activist hedge funds—raiders break things and activists fix them—is wrong).

⁴⁶ Roe & Shapira, *supra* note 22, at 275 (noting that the “narrative faded because the media no longer bought in” or alternatively, “because wealthy and aggressive raiders and hedge fund activists could not credibly promote a narrative of their fighting greedy executives for the benefit of the American people” or ultimately, “because the idea was felled by narrative entrepreneurs who promoted a more powerful narrative, namely that stock-market-driven short-termism was causing American economic decay”).

⁴⁷ Bebchuk, Brav & Jiang, *supra* note 33, at 1095.

⁴⁸ Sam Meredith, *Greta Thunberg Says Davos Elite Are Prioritizing Greed and Short-Term Profits over People and the Planet*, CNBC (Jan. 19, 2023, 7:33 AM), <https://www-cnbc-com.cdn.amproject.org/c/s/www.cnbc.com/amp/2023/01/19/greta-thunberg-says-davos-prioritizing-short-term-profits-over-planet.html>.

⁴⁹ ROE, MISSING THE TARGET, *supra* note 2, at 10.

conceptualizations of corporate social responsibility, corporate purpose, and the need to emphasize corporate attention to the environment, stakeholders, and the risk of climate catastrophe, the so-called ESG issues.”⁵⁰

However, Roe and Shapira criticize the conflation of environmental and social problems and short-termism, arguing that “[e]nvironmental degradation, for example, is often portrayed as due to stock market short-termism, when it primarily emanates from the corporation’s ability to offload costs externally to third parties, *not* from investors’ time horizons.”⁵¹ Environmental damage is stated to be a “problem of *externalities*, not of short-termism.”⁵² Roe argues that a misstatement of the problem can confuse a discussion of the appropriate solution.⁵³ In the context of environmental damage, Roe and Shapira insist “[t]he proper remedy is *not* to alter the firms’ time horizons, but to alter their (and our individual) incentives to internalize the externalities, via, say, a carbon tax.”⁵⁴ Similarly, with hedge fund activism, an assumption that all (or most) hedge fund activism campaigns are short-termist in nature can lead to an unwillingness to consider campaigns on their merits, or a push for policies and regulations that curb or deter *all* hedge fund activism. It is argued here that it would be preferable to have clear conclusions on whether hedge fund activism is in fact short-termist, and most importantly what *types* of activist strategies may be short-termist. Unfortunately, when activists make proposals at target companies, they are often immediately lambasted for being rooted in short-termism rather than critics being open to the possibility that there might be a “legitimate disagreement on corporate strategy,”⁵⁵ which should lead to rigorous analysis of the merits of the particular activist proposal to determine whether it contributes to sustainable value creation.

4. *The Effect of a Strong Narrative*

Bebchuk, Brav, and Jiang note the “myopic-activists’ claim that has been playing a central role in debates over shareholder activism and the legal rules and policies shaping it.”⁵⁶ In particular, “[i]nvoking the long-term costs of activism has become a standard move in arguments for limiting the role, rights, and involvement of activist shareholders.”⁵⁷ This strong narrative is also consistently used and repeated in the political rhetoric focused on activist hedge funds. It is so powerful that it has even engendered bipartisan political support. One example of this is the Brokaw Act, which was

⁵⁰ *Id.* at 5.

⁵¹ Roe & Shapira, *supra* note 22, at 236; *see also* ROE, MISSING THE TARGET, *supra* note 2, at 5–6 (noting that “these corporate responsibility considerations are for the most part not time horizon issues”).

⁵² Roe & Shapira, *supra* note 22, at 249.

⁵³ ROE, MISSING THE TARGET, *supra* note 2, at 7.

⁵⁴ Roe & Shapira, *supra* note 22, at 249.

⁵⁵ *Id.* at 257.

⁵⁶ Bebhuk, Brav & Jiang, *supra* note 33, at 1087.

⁵⁷ *Id.* at 1088.

co-sponsored by Senators Elizabeth Warren and Bernie Sanders in 2016. This was the first attempt at federal legislation aimed at regulating and restricting the “financial abuses being carried out by activist hedge funds who promote short-term gains at the expense of long-term growth.”⁵⁸ Although the legislation ultimately failed, it was re-introduced in 2017 as a bipartisan reform proposed by both Democrat and Republican senators.⁵⁹ Overall, therefore, short-termism is clearly an extremely common and powerful critique of hedge fund activism.

B. *Beyond the Narrative: Activist Hedge Funds and Short-Termism*

Due to the narrative’s strength and its potential influence in corporate lawmaking, it is important to delve more deeply into the actual implications for corporate governance. Looking beyond the simple narrative that is repeated in the media and in politics, there have been some more serious critiques of activist hedge funds and short-termism in academic literature. Here, short-termism is not portrayed as simplistically as it is in the political and media rhetoric. Rather, short-termism has been discussed as “the potentially most important, most controversial, most ambiguous, and most complex problem associated with hedge fund activism.”⁶⁰

It has been argued that “hedge fund activism . . . exacerbates an already serious problem of ‘short-termism’ in the executive suite.”⁶¹ The short-termism (or myopic-activists’) argument essentially proceeds on the basis that the short-term investment horizons of activist hedge funds will induce target company directors and managers to pursue short-term profits and appreciation of the company’s share price at the expense of the long-term success of the company. Whether this actually proves to be the case in practice is vigorously debated by scholars. Overall, short-termism is viewed as absolutely critical to debates on whether activist hedge funds are heroes or villains. Indeed, Kahan and Rock have noted that “[o]ne’s views about whether hedge fund activism, on the whole, is desirable or undesirable are likely to turn on one’s stand on the short-termism problem.”⁶² There are various theories why activist hedge funds may have short-termist tendencies.

⁵⁸ Portia Crowe, *Bernie Sanders and Elizabeth Warren Are Going After Activist Hedge Funds*, BUS. INSIDER (Mar. 18, 2016, 9:08 AM), <https://businessinsider.com/elizabeth-warren-sponsors-activist-hedge-fund-bill-2016-3?r=US&IR=T>.

⁵⁹ The Brokaw Act was originally proposed in March 2016 by United States Senators Tammy Baldwin and Jeff Merkley, and was re-introduced in August 2017 as a bipartisan reform with Republican Senator David Perdue, but ultimately failed. *See generally* Alon Brav, J.B. Heaton & Jonathan Zandberg, *Failed Anti-Activist Legislation: The Curious Case of the Brokaw Act*, 11 J. BUS. ENTREPRENEURSHIP & L. 329 (2018).

⁶⁰ Kahan & Rock, *supra* note 11, at 1087.

⁶¹ *Id.* at 1083.

⁶² *Id.*

1. *The Business Model of Activist Hedge Funds*

First, the business model of activist hedge funds may predispose them to short-term investments and behavior. Coffee and Palia have highlighted that “[t]he archetypal ‘transient investor’ is probably the hedge fund”⁶³ Strine has also similarly noted that “many activist investors hold their stock for a very short period of time and may have the potential to reap profits based on short-term trading strategies that arbitrage corporate policies.”⁶⁴ Indeed, there are logical reasons why activist hedge funds may be more short-term oriented in their outlook compared to some other types of investors, namely their business model and, in particular, the compensation structure that is typical for hedge fund managers.

Activist hedge fund managers have traditionally been remunerated using a formula whereby they charge fees of two percent of the assets under management combined with a performance fee of twenty percent of the gains made by the portfolio.⁶⁵ Therefore, the price at which activist hedge funds buy and sell stocks is absolutely crucial to the hedge fund manager’s overall compensation. In order to generate a strong performance fee for the manager, the fund ideally needs to secure quick returns that outperform the market. This business model and compensation structure relies upon hedge fund managers maximizing returns on multiple investments, then exiting to invest in new targets. If they are not able to do this, their ultimate investors might choose to withdraw their funds and switch to another fund with superior financial performance.⁶⁶ Some argue that this may lead to activist hedge funds “sacrificing the future for a quick buck.”⁶⁷

Concerns also relate to the fact that the short-term focus of hedge funds might resultingly induce directors and managers themselves to engage in short-termist behavior due to fear of activist intervention (a concern that Bebchuk, Brav, and Jiang have labelled the “counterproductive-accountability

⁶³ Coffee & Palia, *supra* note 14, at 574.

⁶⁴ 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, 8 (2010) [hereinafter *One Fundamental Corporate Governance Question*].

⁶⁵ The traditional “two and twenty” fee model dates back to 1949 with the founding of AW Jones & Co, considered by many to be the world’s first hedge fund. More recently, hedge funds may remunerate their managers with variations of this model, especially in the light of much lower fees charged by passive index-tracking funds. See Lindsay Fortado, *Hedge Fund Investors Question ‘2 and 20’ Fees*, FIN. TIMES (June 6, 2017), <https://www.ft.com/content/291081ba-49df-11e7-a3f4-c742b9791d43>.

⁶⁶ Coffee & Palia, *supra* note 14, at 572–73.

⁶⁷ See Bebchuk, Brav & Jiang, *supra* note 33, at 1136; see also Anabtawi, *supra* note 21, at 564 (showcasing an example of a hedge fund-shareholder raising capital for a new fund that “[a]s part of its marketing effort, it wants to show impressive returns on its prior fund” in an effort to generate such returns the fund “is likely to favor policies by firms . . . that produce short-term gains, even if a more patient investment orientation would generate higher returns over the long term”).

claim”).⁶⁸ In the same vein, Strine has argued that as directors are “increasingly vulnerable to pressure from activist investors,” this may lead them to “sacrifice long-term performance for short-term shareholder wealth.”⁶⁹ This concern may be further legitimized by the fact that directors and managers themselves may similarly have short-term interests at heart. Indeed, the compensation of boards of directors and the incentives of CEOs and other managers historically revolve around short-term targets. For example, it has been argued that a typical CEO would weigh results during their own expected tenure above longer-term results.⁷⁰

2. *Short-Termist Campaign Tactics*

In addition to highlighting the general incentives that fund managers undoubtedly have to generate high returns as quickly as possible, critics of hedge fund activism most often draw attention to the type of campaign strategies that activists may pursue that can be viewed as short-termist. As a general criticism, there is the accusation that activist hedge funds effectively engage in “pump and dump” schemes. The tenor of this criticism is that all activist hedge funds do is “create a short-term spike in the target stock’s price, then exit, leaving the other shareholders to experience diminished profitability over the long-run.”⁷¹ The implication is that there will ultimately be longer-term value destruction, with hedge funds only achieving a “short-term bump in the stock price” in order to “book quick profits” and then “bail out, leaving corporate management to clean up the mess.”⁷² Although the stock price of a company should theoretically be an accurate representation of the present value of expected future cash flows, the market may be much better at valuing short-term projects and visible quarterly earnings rather than complex long-term technologically sophisticated projects⁷³ or indeed risks such as the impact of climate change.⁷⁴ Therefore, there can be a valuation bias in favor of the types of “quick fix” actions that hedge funds are known for implementing.

⁶⁸ Bebchuk, Brav & Jiang, *supra* note 33, at 1087, 1095; *see also* Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1676–78 (2013) (analyzing the fears of activist interventions).

⁶⁹ Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 790–91 (2015).

⁷⁰ Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 980 (2013) (noting that the average tenure for a CEO in the United States is seven years).

⁷¹ Coffee & Palia, *supra* note 14, at 549.

⁷² Bill George, *Activists Seek Short-Term Gain, Not Long-Term Value*, N.Y. TIMES (Aug. 26, 2013, 10:56 AM), <https://archive.nytimes.com/dealbook.nytimes.com/2013/08/26/activists-seek-short-term-gain-not-long-term-value/>.

⁷³ ROE, MISSING THE TARGET, *supra* note 2, at 78.

⁷⁴ *See generally* Madison Condon, *Market Myopia’s Climate Bubble*, 2022 UTAH L. REV. 63 (explaining the underpricing of corporate climate risk).

Strine also argues that activist hedge funds “can easily depart and not ‘eat their own cooking.’”⁷⁵

More specifically, it is advocated that certain types of changes that hedge fund activists might promote may diminish the value of the corporation in the long run.⁷⁶ The first general category of such campaign strategies is what can be described as “balance sheet activism,” where activist hedge funds “sway and bully management to . . . meet the quarterly targets and disgorge cash in extra dividends or stock buy backs in lieu of investing in long-term growth.”⁷⁷ Bebchuk, Brav, and Jiang categorize these types of interventions as “investment-limiting” interventions and include within the category (i) increased leverage; (ii) increased shareholder payouts (whether through dividends or stock buybacks); and (iii) reduced long-term investment in research and development.⁷⁸ These forms of hedge fund activism were pervasive, at least in the 2000s, and they do still form part of the activist playbook. Strine has pointed out that “[i]t is easy to find examples of activism designed to encourage boards to increase leverage in order to pump up immediate returns to stockholders.”⁷⁹ This prevailing narrative regarding activist hedge funds persists to the present day, in that they are viewed as “primarily financial engineers interested in the largest possible profit in the shortest period of time.”⁸⁰

3. *Empirical Evidence on Short-Termism*

One measure of short-termism is how long activist hedge funds remain invested in the companies they target. In 2007, it was noted that the median holding period for activist hedge fund investments was around fifteen months.⁸¹ In terms of results, empirical studies have generally shown that hedge fund activist campaigns typically result in short-term gains for

⁷⁵ *One Fundamental Corporate Governance Question*, *supra* note 64, at 8.

⁷⁶ *Who Bleeds*, *supra* note 1, at 1872, 1938.

⁷⁷ Ira M. Millstein, *Re-Examining Board Priorities in an Era of Activism*, N.Y. TIMES (Mar. 8, 2013, 3:52 PM), <http://dealbook.nytimes.com/2013/03/08/re-examining-board-priorities-in-an-era-of-activism/>.

⁷⁸ Bebchuk, Brav & Jiang, *supra* note 33, at 1136–38; *see also* Coffee & Palia, *supra* note 14, at 549, 553, 573–77 (noting that activist hedge fund interventions often involve increases in leverage and shareholder payouts and decreases in investment, particularly long-term investment in research and development); William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1379 (2007) (noting that hedge funds typically seek sale of the company, a division, or a large cash payment from a special dividend or stock repurchase). On research and development, *see generally* the study by Brav, Jiang, Ma, and Tian, presenting empirical evidence that firms targeted by hedge fund activists actually experience an improvement in innovation efficiency despite a tightening in R&D expenditures. Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?*, 130 J. FIN. ECON. 237 (2018).

⁷⁹ *One Fundamental Corporate Governance Question*, *supra* note 64, at 13 n.44.

⁸⁰ Anabtawi, *supra* note 21, at 580.

⁸¹ Bebchuk, Brav & Jiang, *supra* note 33, at 1104 tbl.2.

shareholders.⁸² This price spike tends to center around the announcement of activism itself. For example, studies in the 2000s on hedge fund activism in the United States have documented that the filing of a Schedule 13D by an activist hedge fund results in positive share price spikes of around eight percent.⁸³ Further data confirming this effect is available in a study published by Bebchuk, Brav, and Jiang, where it was discovered that the average abnormal returns for the twenty-day period before and after an activist investor files a Schedule 13D are approximately six percent.⁸⁴ Therefore, the available empirical evidence in relation to abnormal short-term gains from activist intervention is quite clear. This has led some proponents of hedge fund activism to argue that “this positive market reaction to the appearance of a hedge fund activist is consistent with the view that activists provide benefits to, rather than impose costs on, the targets of their campaigns.”⁸⁵

With respect to the long-term effects of hedge fund activism, however, the empirical evidence tends to be more mixed. Some opponents of hedge fund activism argue that the short-term stock price spikes that arise upon an activist intervention are reversed over time, as market myopia fails to account for the likely negative long-term stock returns.⁸⁶ Some studies

⁸² Empirical studies tend to demonstrate short run average abnormal returns ranging from three percent to nine percent for various samples and event windows. For a survey of the empirical literature on this point, see Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and Market-based Shareholder Influence* 39 (Eur. Corp. Governance Inst., Working Paper No. 797/2021, 2022), <https://ssrn.com/abstract=3955116> [hereinafter *Governance by Persuasion*].

⁸³ Coffee & Palia, *supra* note 14, at 551 (citing Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1755–57 (2008) [hereinafter *Hedge Fund Activism*] (documenting an average 7.2% abnormal buy-and-hold return in twenty days post-Schedule 13D filing for the overall sample and an average (median) abnormal return of 8.4% for campaigns in which a hedge fund describes a new and explicit agenda in the Schedule 13D beyond a general statement of maximizing shareholder value in the filing)); April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 207–11, 225–26 (2009) (noting a mean (median) size-adjusted return of 7.3% (4.9%) and 10.2% (8.9%) during event windows five days and thirty days post-filing, respectively); Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323, 328–29 (2008) (noting that firms targeted by activists earn a mean size-adjusted return of 3.39% around the 13D filing date, using an event window of two days pre- and post-filing); Robin Greenwood & Michael Schor, *Investor Activism and Takeovers*, 92 J. FIN. ECON. 362, 366–67 (2009) (noting that the immediate returns to activism are approximately 3.5% over a fifteen-day event window); *see also* Bebchuk, Brav & Jiang, *supra* note 33, at 1121 (explaining a summary of the empirical evidence documenting the initial positive (short-term) stock market reaction to activist hedge fund interventions); *see generally* Marco Becht, Julian Franks, Jeremy Grant & Hannes Wagner, *Returns to Hedge Fund Activism: An International Study* (Eur. Corp. Governance Inst., Working Paper No. 402/2014, 2017), <https://ssrn.com/abstract=2376271> (noting that disclosures of activist interventions are accompanied by an average of 6.4% of positive abnormal stock returns).

⁸⁴ Bebchuk, Brav & Jiang, *supra* note 33, at 1122 (noting that the average abnormal return in a forty-day window surrounding the filing of a Schedule 13D in their sample of activist interventions from 1994 to 2007 are approximately 6%).

⁸⁵ *Id.*

⁸⁶ *See id.* at 1120–21 (“[O]pponents of hedge fund activism believe that the initially positive stock-market reaction to activist interventions represents inefficient, myopic market pricing that fails to reflect

indeed suggest that there is no statistically significant change in the long-term operating performance of targeted companies.⁸⁷ By contrast, Bebchuk, Brav, and Jiang have analyzed the long-term effects of hedge fund activism (which they define as a five-year period following activist intervention) and contend that “[o]verall, the analysis of stock returns carried out . . . provides no support for the claim that activist intervention makes shareholders of target companies worse off in the long term.”⁸⁸ There is no real consensus on this point, and scholars continue to debate whether the short-term gains from activist intervention are reversed in the long run. It can also prove difficult to empirically test whether hedge fund activism is beneficial in the long run, as there are so many intervening variables affecting corporate performance following an activist intervention.

4. *Conflicts Between Shareholders*

If hedge fund activism causes corporations to be worse off in the long run, long-term shareholders such as pension funds or index funds would similarly be worse off. This would necessarily create a conflict between the interests of short-term activist hedge fund investors and longer-term investors.⁸⁹ In fact, many commentators do consider the interests of short-term shareholders and long-term shareholders to inevitably be in conflict. However, it may be that most shareholder conflicts can be overcome, as hedge funds ordinarily need the support of long-term shareholders in order to succeed in their campaigns.⁹⁰ This is especially the case at larger companies, where hedge funds necessarily own a smaller percentage of the

the subsequent negative returns that are experienced by long-term shareholders and make such shareholders worse off.”); see also Kahan & Rock, *supra* note 11, at 1084 (noting that “[f]or the short-term trading horizon of hedge funds to generate a short-term investment outlook for hedge fund managers, the stock market must suffer from *myopia*: . . . undervalue[ing] long-term investments relative to short-term investments” and therefore, “[i]f the market does not itself suffer from such a bias, then the interests of investors with short-term trading horizons will not conflict with those of investors with long-term trading horizons”).

⁸⁷ See summary of empirical studies of shareholder activism presented in Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN., 55, 61–62 tbl.2, 66–67 (2007) (concluding that the results of studies of the long-term stock performance of targeted companies have been mixed, and that virtually all studies of long-term operating performance have reported no statistically significant changes in the operating performance of targeted companies).

⁸⁸ Bebchuk, Brav & Jiang, *supra* note 33, at 1130 (“[T]he market does not fail to appreciate the long-term consequences of activism as insulation advocates fear it does. Rather, the stock appreciation accompanying activists’ initial announcement reflects the market’s correct anticipation of the intervention’s effect, and the initial positive stock reaction is not reversed in the long term.”).

⁸⁹ Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1290 (2008).

⁹⁰ Kahan & Rock, *supra* note 11, at 1027.

stock. It is also increasingly the case with the rise of index investment and the concentration in power among asset managers.⁹¹

Overall, it is undeniable that the most vocal criticism of hedge fund activism is short-termism, whether that be through the narrative repeated in politics and the media, or through a more thorough academic analysis of the incentives of activist hedge funds and corporate boards of directors.⁹² Therefore, it would be unusual for any assessment of hedge fund activism to take place in the absence of a discussion on short-termism. Although some commentators argue that short-termism is not a problem, or that short-term goals are not necessarily incompatible with the long-term success of the corporation,⁹³ to ignore the short-termist critique would leave any analysis open to immediate criticism in terms of hedge funds' potential short-term orientation.

The most common counter argument is to emphasize the virtues of hedge fund activism in terms of shareholder democracy reducing shareholder-manager agency costs.⁹⁴ As highlighted earlier, drawing attention to management excess or corporate fraud is key to the narrative that hedge fund activists themselves promote through public statements about their target companies. This Article instead focuses on data shedding light on the reality of more recent activist hedge fund campaigns at the largest companies in the United States.

II. ACTIVIST BOARD REPRESENTATION

A. *The Evolution of Hedge Fund Activism*

Proxy contests are not a new concept. Beginning in the 1950s, there were various high-profile battles for the control of companies in the United States.⁹⁵ However, hedge fund activism did not become a fundamental part

⁹¹ Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2033 (2019); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 19 (2019).

⁹² Coffee & Palia, *supra* note 14, at 548; Kochkodin & Melby, *supra* note 28; Lipton, *supra* note 21; Lipton, Mirvis & Lorsch, *supra* note 31.

⁹³ See generally Bebchuk, Brav & Jiang, *supra* note 33, at 1154.

⁹⁴ For a discussion of shareholder-manager agency costs, see John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29–30 (Reinier Kraakman et al. eds., 3rd ed. 2017).

⁹⁵ See John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1752–53 (2007) (discussing the Young proxy contest for the control of the New York Central Railroad in 1954); see also John Armour & Brian Cheffins, *Stock Market Prices and the Market for Corporate Control*, 2016 U. ILL. L. REV. 761, 781 (identifying 398 proxy contests between 1900 and 1965).

of the United States corporate governance ecosystem until the 2000s,⁹⁶ and activist board representation is an even more recent phenomenon. Armour and Cheffins draw a distinction between “offensive” and “defensive” shareholder activism, with hedge funds representing the archetypal offensive shareholder activist.⁹⁷ Activist hedge funds identify target firms and purposefully invest in them to pursue an activist agenda, whereas other institutional investors tend to be reactionary and will usually only engage in activism to protect existing holdings.⁹⁸

However, as discussed in Part I, activist hedge funds have consistently been criticized for being short-termist.⁹⁹ In particular, they are accused of engaging in financial wizardry rather than making substantive long-term improvements to target company strategies and operations.¹⁰⁰ Despite the existence of empirical studies arguing that hedge fund activists create long-term as well as short-term value, the popular narrative is still that they are short-term actors. For example, as recently as 2017, Strine argued that “the stories behind the empirical data cited by hedge fund activists seem to mostly involve financial engineering. . . . the scholars have not yet put names of companies to the data, to show how the hedge fund has improved corporate operations in a durably valuable way.”¹⁰¹

Indeed, in 2014, the activist hedge fund Starboard Value made history by succeeding in its campaign to replace the entire board of an S&P 500 company, Darden Restaurants.¹⁰² Described as “the ugliest shareholder revolt of 2014,”¹⁰³ Starboard’s strategy for Darden was contained in a public 294-page white paper, which explained in intricate detail how the activist hedge fund planned to execute a turnaround of the company, particularly with regard to deficiencies in strategy and operations at the underperforming Olive Garden restaurant chain.¹⁰⁴ Starboard’s campaign commenced after it was contacted by frustrated Darden shareholders, who persuaded the hedge fund to invest in and target the company.¹⁰⁵ Despite holding less than ten percent of the shares in Darden, Starboard’s campaign culminated in the activist hedge fund securing sufficient shareholder votes to replace all of Darden’s incumbent board with twelve new nominees. Ten of the nominees

⁹⁶ Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 75–81, 102 (2011) (discussing the history of the direct antecedents to activist hedge funds).

⁹⁷ *Id.* at 56–57.

⁹⁸ *Id.*

⁹⁹ See *supra* note 21 and accompanying text.

¹⁰⁰ See *supra* note 21 and accompanying text.

¹⁰¹ *Who Bleeds*, *supra* note 1, at 1953.

¹⁰² Foley, *supra* note 8.

¹⁰³ *Darden Restaurants: Back for Seconds*, FIN. TIMES (Mar. 25, 2015), <https://www.ft.com/content/50d307f2-d260-11e4-9c25-00144feab7de>.

¹⁰⁴ STARBOARD VALUE, *supra* note 4.

¹⁰⁵ OWEN WALKER, BARBARIANS IN THE BOARDROOM: ACTIVIST INVESTORS AND THE BATTLE FOR CONTROL OF THE WORLD’S MOST POWERFUL COMPANIES 49 (2016).

were seasoned executives who had expertise in the food and drinks industry or in corporate turnarounds, who were not affiliated with the hedge fund. The elected slate also included two representatives from Starboard—its founder, Jeff Smith, and its head of research. The change in leadership at Darden ultimately appeared to result in a very effective turnaround, with the company's share price rising by nearly sixty percent in the eighteen months following the hedge fund's intervention.¹⁰⁶

Boardroom coups initiated by shareholders, such as Starboard's campaign at Darden, are extremely rare events. Indeed, this campaign was the first and last time (to date) that an activist hedge fund took complete control of an S&P 500 company's board in the United States.¹⁰⁷ However, less extreme examples of minority board representation by activist hedge funds are much more commonplace.

This Part introduces activist board representation as a fundamental phenomenon in the evolution of hedge fund activism over the past decade. The theory on activist board representation and prior empirical studies on hedge fund activism form the foundation to develop several hypotheses about how activist board representation might manifest differently to other types of hedge fund activism.

This Article accepts that challenge and seeks to explore whether this short-term narrative accurately reflects modern-day hedge fund activism. Critics take issue with activist hedge funds engaging in what is sometimes termed "balance sheet activism," which involves quick returns of cash to shareholders through increased dividends or share buybacks. This Article shows, however, that activist hedge funds can often become much more involved in company strategy and operations than the financial wizardry critics suggest. The hand-collected dataset, which forms the basis for the empirical study in Part III, systematically analyzes the types of activism that hedge funds are now engaging in at the biggest companies in the United States.

B. *Research Questions and Hypotheses*

This Section outlines the research questions that motivated the empirical study and develops the hypotheses that are tested in the study. Overall, this Article seeks to explore the evolution of hedge fund activism and whether activist board representation is associated with fundamentally different types of behavior on the part of activist hedge funds, compared to cases where the funds do not seek or secure board representation.

¹⁰⁶ Michael J. de la Merced, *Starboard Value's Rise to Activist Prominence*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/business/dealbook/starboard-values-rise-to-activist-prominence.html>.

¹⁰⁷ WALKER, *supra* note 105, at 41–68; data analyzed *infra* Part III.

1. *Prevalence of Activist Board Representation*

Research Question 1 – Is activist board representation becoming a more common form of hedge fund activism?

The first research question explores whether activist board representation is becoming more prevalent. Anecdotal evidence suggests that it is, but the empirical study in Part III seeks to explore the prevalence of this phenomenon more systematically. When hedge fund activism rose to prominence in the 2000s, board representation was already a relatively common campaign objective pursued by activist hedge funds. For example, a study conducted by Brav, Jiang, Partnoy, and Thomas discovered that 24.8% of activist campaigns in the United States from 2001 to 2006 involved activist hedge funds seeking board representation.¹⁰⁸ In Brav, Jiang, Partnoy, and Thomas' sample, the campaigns in the dataset were divided into cases where the activist hedge fund sought board representation without a proxy contest or confrontation with existing management (11.6% of events) and cases where the hedge fund launched a proxy contest in order to replace board directors (13.2% of events).¹⁰⁹ Another empirical study conducted around the same time by Klein and Zur, which focused on a sample of campaigns conducted between 2003 and 2005, found that 27% of campaigns in the sample involved a request for a change in the board of directors' composition (41 out of 151 events).¹¹⁰ Finally, in a study conducted by William Bratton analyzing activist campaigns from 2002 until mid-2006, it was noted that larger targets (large and mid-capitalization companies) predominated in the cash payout and asset sale groups, and were underrepresented when it came to board representation or proxy contests, with only 18% of large or mid-cap firms surrendering board seats.¹¹¹ Bratton uses this datapoint to make the argument that large firms could afford to pay off activists and return to normalcy, rather than having to surrender board seats.¹¹²

Although none of the studies specifically focus on the S&P 500, prior to 2010, activist board representation campaigns were uncommon at S&P 500 companies. No previous empirical study specifically analyzes activist board representation prior to 2010. However, some relevant data can be extracted from prior literature on hedge fund activism more broadly. For example, Bebchuk, Brav, Jiang, and Keusch authored a paper analyzing settlement agreements between hedge fund activists and target companies from 2000 to 2013.¹¹³ The events in their dataset were mainly identified through Schedule 13D filings, but were also supplemented with news searches to identify

¹⁰⁸ *Hedge Fund Activism*, *supra* note 83, at 1743.

¹⁰⁹ *Id.*

¹¹⁰ Klein & Zur, *supra* note 83, at 197 tbl.1.

¹¹¹ Bratton, *supra* note 78, at 1416.

¹¹² *Id.*

¹¹³ *Dancing with Activists*, *supra* note 10, at 4.

activists who launched public campaigns with stock ownership below 5%.¹¹⁴ In their appendix, they separate out “notable activist campaigns” that took place at large target companies with at least \$7 billion in market capitalization.¹¹⁵ Analyzing this data reveals that there were only six cases between 2000 and 2009 where S&P 500 companies concluded settlement agreements with activist hedge funds for board representation.¹¹⁶ This data does not include *unsuccessful* attempts at board representation (as it only analyzes settlement agreements between activists and target companies), and it also excludes cases involving proxy contests that went to a shareholder vote (again, as it only considers negotiated settlements). Nevertheless, this is useful data, especially given that many or most activist board representation campaigns result in settlement in any event.¹¹⁷

Further evidence of the incidence of activist board representation campaigns at S&P 500 companies prior to 2010 can be found in Bratton’s study.¹¹⁸ Here, only 9 out of 114 target companies (8%) targeted from 2002 to 2006 were constituents of the S&P 500. Activists secured board representation at two of those companies (22% of the S&P 500 companies targeted).¹¹⁹ Combining these two sources of data from prior empirical studies results in only eight identified cases of activist board representation at S&P 500 companies from 2000 to 2009.

Reports from the industry have also suggested that activist board representation may be on the rise. For example, a report by Lazard highlighted that 2016 was a record year for activist hedge funds succeeding in placing nominees on corporate boards in the United States. In the report, it was noted that activist hedge funds gained 131 board seats in total from 149 campaigns to secure board representation.¹²⁰

Research Question 2 – Is activist board representation becoming a more successful form of hedge fund activism?

A related research question concerns how successful activist board representation campaigns are, with the caveat that reporting success rates is

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 35 tbl.A.1.

¹¹⁶ *Id.* An analysis of the authors’ data reveals that they only identified six activist settlements at S&P 500 companies where activist hedge funds secured the appointment of new directors in the ten-year period from 2000 to 2009 (Time Warner/Icahn in 2006, Home Depot/Relational Investors in 2007, Motorola/Icahn in 2008, Yahoo/Icahn in 2008, Sara Lee/ValueAct Partners in 2008, and Intuit/Relational Investors in 2009).

¹¹⁷ See *infra* Part II.B.7.

¹¹⁸ See generally Bratton, *supra* note 78.

¹¹⁹ See *id.* at 1429–32. The relevant target company/hedge fund pairs were Massey Energy/Third Point in 2005 and H. J. Heinz/Trian Partners in 2006.

¹²⁰ John C. Coffee, Jr., Robert J. Jackson, Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board?*, 104 CORNELL L. REV. 381, 386 & n.4 (2019).

problematic as they are endogenous to the underlying engagement choices. The study by Brav, Jiang, Partnoy, and Thomas does not report the number or percentage of such campaigns that ultimately led to activist hedge funds actually securing board representation. The authors do report a success rate of 40.6% for activist hedge fund events generally, where success was defined as the activist hedge fund achieving its main stated goals.¹²¹ However, this figure was not broken down to report the success rate for board representation campaigns specifically.

In a more recent working paper, surveying activist hedge fund data from 1994 to 2018, Brav, Jiang, and Li note that “in close to half of proxy contests, the dissident wins at least one seat.”¹²² However, this study averages the results from campaigns in recent years with campaigns from the 1990s and 2000s. Given that hedge fund activism has evolved considerably since the 1990s and early 2000s, averaging the results of activist campaigns over such an extended time period is not necessarily helpful for analyzing current trends in hedge fund activism.

The Klein and Zur study did report success rates of different types of campaign strategies. Here, they noted that hedge funds generally enjoyed a 60% success rate overall in their campaigns, but that they succeeded in achieving board representation in 73% of campaigns (or 30 out of 41 attempts).¹²³ Overall, this translated into activist hedge funds achieving board representation at slightly less than 20% of the companies in the sample (30 out of 151 events).¹²⁴ At the time, Klein and Zur noted that their findings ran counter to evidence presented by Bebchuk that “U.S. shareholders’ ability to replace the board of directors is ‘largely a myth.’”¹²⁵ Klein and Zur also observed, however, that the success rate of activist hedge funds securing board representation was lower than the success rate for financial activism. Indeed, in their sample, activist hedge funds had a 100% success rate in getting the target company to buy back its own stock or initiate a cash dividend.¹²⁶ The success rate of financial activism was therefore higher than the success rate of activist board representation, meaning that other forms of activism were even less successful and brought the overall average success rate for all campaigns down to 60%. Although the sample size used in this study was relatively small, this finding is consistent with the view that in the early to mid-2000s, financial or balance sheet activism was a more prevalent and a more successful strategy than seeking activist board representation.

¹²¹ *Hedge Fund Activism*, *supra* note 83, at 1744.

¹²² *Governance by Persuasion*, *supra* note 82, at 14.

¹²³ Klein & Zur, *supra* note 83, at 211.

¹²⁴ *Id.* at 212.

¹²⁵ *Id.* at 211–14 (citing Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 711 (2007)).

¹²⁶ *Id.* at 211.

The above research questions and discussion leads to the following hypotheses:

Hypothesis 1 – Activist board representation campaigns are increasingly prevalent at S&P 500 companies.

Hypothesis 2 – Activist board representation campaigns are increasingly successful at S&P 500 companies.

While early activist hedge fund campaigns may have focused more on financial or balance sheet activism, it is explored here whether activist board representation has become a strategy of choice in the United States, especially among the largest companies and the most formidable activist hedge funds.

There are several potential reasons why we might expect there to be more campaigns focusing on board representation now, compared with the earlier examples of hedge fund activism.

i. Low Hanging Fruit

First, there is some evidence to suggest that in the 2000s, activist hedge funds may have focused on “low-hanging fruit” by targeting cash-rich companies that could quickly and easily redistribute cash to shareholders.¹²⁷ In Bratton’s empirical study, it was noted that the results “imply that the activists grabbed low-hanging fruit in the first three years, [2002 to 2004], searching thereafter among a depleted stock of prime targets.”¹²⁸ So, even by the end of 2004, it seems that such targets were less readily available than they had been at the beginning of the decade. Moreover, in a more recent review of the empirical evidence, Brav, Jiang, and Li noted that “under-performing firms with cash flow problems were low-hanging fruit for the first generation of activist investors while in the post-financial crisis period hedge funds have had to identify targets with issues that are not associated with the traditional fundamental performance metrics such as ROA.”¹²⁹ Perhaps these types of target companies with excess cash balances are less common in the present day. This could be for a number of reasons, including that there is a prominent activist defense industry of advisors who help to ensure that companies are less vulnerable to being targeted by activist hedge funds. Therefore, opportunities to target cash-rich “low-hanging fruit” may be less plentiful nowadays. There is also the issue that institutional investors and other longer-term shareholders may be reluctant to support such tactics on the part of activist hedge funds, especially if they are

¹²⁷ Bratton, *supra* note 78, at 1394–95.

¹²⁸ *Id.* at 1395.

¹²⁹ *Governance by Persuasion*, *supra* note 82, at 33. Return on Assets (ROA) is a financial ratio used to determine how profitable a company is relative to its total assets.

perceived as short-term financial engineering that is ultimately harmful to long-term shareholders. Instead, activist hedge funds may be forced to gravitate towards more substantive forms of activism such as campaigns involving strategic and operational change.

ii. Institutional Investor Support

Second, as alluded to above, substantive activist strategies may be more palatable to long-term institutional investors compared with balance sheet activism, which may be viewed as financial engineering. It has always been the case that activist hedge funds cannot succeed in their campaign goals alone. They generally hold a minority stake in a company—often less than a ten percent shareholding—which means that they rely on the support of other investors to succeed in their campaigns.¹³⁰ This support comes principally from institutional investors rather than retail investors, as institutions are the biggest shareholders at most public companies.¹³¹ Financial or balance sheet activism is usually not appealing to long-term institutional investors, so such investors may object to activist hedge fund interventions of this nature. For example, State Street Global Advisors recently stressed that they had “identified certain actions as potential red flags for long-term investors as they raise questions about the motivations behind the actions and potential implications for sustainable value creation.”¹³² One red flag identified was “[f]ocusing on financial engineering such as share buybacks, leveraged dividends, spin-offs and M&A, which could add value in the short term but may also undermine long-term value.”¹³³ Therefore, it is clear that institutional investors are less likely to support activist campaigns that focus on financial activism, as opposed to campaigns that at least appear to focus on more substantive long-term value creation. Hedge fund activist board representation may be more appealing to long-term institutional investors if they perceive it as demonstrating a longer-term commitment on the part of the activist hedge fund, or if it is combined with strategies where the hedge fund is making a more substantive contribution to long-term value creation at the company. Whether institutional investors support activist board representation campaigns could also potentially depend a lot on the identity of the proposed director nominees.

¹³⁰ *Hedge Fund Activism*, *supra* note 83, at 1732 (analyzing a dataset of hedge fund activism campaigns from 2001 to 2006 and noting that “[t]he median maximum ownership stake for the entire sample is about 9.1%”); *see also infra* Part III.C.1.ii (finding that on average, activist hedge funds hold roughly a six percent shareholding and thus rely on support from institutional investors during campaigns).

¹³¹ Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725 (2019) (noting that over the last fifty years, institutional investors have come to hold a majority of the equity of public companies in the United States).

¹³² STATE STREET GLOBAL ADVISORS, PROTECTING LONG-TERM SHAREHOLDER INTERESTS IN ACTIVIST ENGAGEMENTS 2 (Apr. 2020).

¹³³ *Id.*

Activist hedge funds are repeat players, so the success of their campaigns also matters for their reputation and the potential success of future campaigns. Therefore, it is beneficial if activists can tailor their strategies to ensure that long-term institutional investors are supportive of their campaigns.

iii. A Means to an End

Third, activist board representation could simply be viewed as a means to an end or as an intermediary step that is needed for activist hedge funds to achieve other goals. Activist hedge funds primarily aim to increase the value of their shares.¹³⁴ Indeed, there are various different tactics that activist hedge funds can use to try to improve the stock price of a target company. Some of these tactics are entirely feasible to implement from outside of the boardroom.

The primary example is financial or balance sheet activism, which can involve increased dividends or share buybacks. A board seat is unlikely to be necessary for the activist hedge fund to push through such a change. Similarly, it may be possible to obtain a takeover premium for the shares by putting the target company into play as a takeover target.¹³⁵ However, if the fundamental problem at a company is its strategy or operations, it may be difficult for an activist hedge fund to effect change from outside of the boardroom.

Although hedge funds can potentially try to pursue these other types of activism without having the benefit of one or more board seats, having access to the board can expedite progress towards their desired goals and render their campaigns more likely to succeed. Some types of activist interventions—such as strategic or operational activism—are likely to be much more effective if the activist hedge fund has at least one board seat which gives the fund access to strategic discussions. Without board representation, it may be difficult for activist hedge funds to ensure that their value-creating strategies are being effectively implemented. Therefore, we might simply see an increase in activist board representation because it is a *necessary prerequisite* in order for activist hedge funds to achieve campaign goals relating to corporate strategy or operations. Similarly, if an activist hedge fund seeks to replace the CEO or remove other managers, board representation can also result in activist directors holding positions on key board committees which would give them a direct role in choosing the next CEO of the company. Another related benefit of a board seat, as outlined below, is the potential access to information that such a board seat will afford

¹³⁴ *Governance by Persuasion*, *supra* note 82, at 37 (“More than any other type of shareholder activist, hedge funds are results-driven.”).

¹³⁵ *See generally* Greenwood & Schor, *supra* note 83, at 363 (explaining that returns associated with activism are often actualized when activists force target firms into a takeover and collect a takeover premium).

the activist hedge fund. This can be particularly useful for changes to strategy and operations.

Bebchuk, Brav, Jiang, and Keusch have made a similar “means to an end” argument to rationalize their analysis of settlement agreements between hedge fund activists and target companies.¹³⁶ Here, the evidence showed that settlement agreements tend to focus on changes in board composition as opposed to containing any specific agreement to implement the type of operational changes that activists ultimately seek.¹³⁷ However, the analysis also demonstrated that settlements were often followed by major changes that were not specifically contracted for in the agreement itself, such as increases in CEO turnover, increased payouts to shareholders, and a higher likelihood of a sale or going-private transaction.¹³⁸ Therefore, activist board representation may indeed be a necessary or effective precondition to activists implementing these types of changes at target companies.

iv. Access to Information

Finally, another primary motivator for activist hedge funds to seek board representation may be the access to confidential information that a board seat gives them.¹³⁹ Once hedge funds secure board representation, they have access to confidential company documents and data that they would not otherwise be able to access.¹⁴⁰ Activists are also sometimes given board observer status in settlement agreements, which shows that access to the board and the associated information that status provides is valuable to hedge fund activists even if formal board representation is not secured.¹⁴¹

The issue of activists and information asymmetry is multifaceted. From one perspective, activist hedge funds can help to *address* the informational challenges faced by independent directors on the monitoring board. Kastiel and Nili describe this as overcoming the “informational capture” of the board, as activist hedge funds have the resources to collect and analyze a vast amount of information, and activist-appointed directors can rely on their “back office” at the hedge fund to enable them to contribute more

¹³⁶ *Dancing with Activists*, *supra* note 10, at 2, 12–17.

¹³⁷ *Id.* There are various legal reasons why this may be the case. See Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 397 (noting that “directors, as fiduciaries, cannot contract away their discretion”).

¹³⁸ *Dancing with Activists*, *supra* note 10, at 3, 25–30.

¹³⁹ Another way that activists can obtain information is by a “220 demand,” which refers to the right of a shareholder, under § 220 of the Delaware General Corporation Law, to examine certain corporate books and records for any proper purpose. Sujeet Indap, *Shareholders Win a New Legal Tool to Challenge M&A Deals*, FIN. TIMES (Feb. 12, 2018), <https://www.ft.com/content/bb2ed60a-0d39-11e8-839d-41ca06376bf2>.

¹⁴⁰ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 403–05.

¹⁴¹ *Id.* at 401–02 n.51 (noting that “in approximately 8% of the settlements in our dataset the activist instead settles for board ‘observer’ rights, in which the new director gains access to the boardroom before her formal appointment to the board”).

substantively to the company's strategy.¹⁴² Therefore, activist-appointed directors can *contribute* information, and thus strategies, to the rest of the board. From another perspective, activist hedge funds may want board access in order to *obtain* inside information from management. Hamdani and Hannes argue that the primary benefit to a hedge fund of activist-appointed directors is that these directors gain access to the company's non-public information and are able to share this information with the activist hedge fund.¹⁴³ The hedge fund can then further analyze the information and help to formulate corporate strategies.¹⁴⁴ Therefore, there can be a two-way information flow.

However, there is a potential "dark side"¹⁴⁵ associated with activist hedge funds having access to confidential inside information. Coffee, Jackson, Mitts, and Bishop go so far as to argue that hedge fund activism, and in particular wolf pack activism, may be fueled by subsidies caused by access to material, non-public information.¹⁴⁶ In an analysis of 475 private settlement agreements from 2000 to 2015, the authors discovered that once an activist-nominated director joins a target board pursuant to a settlement agreement, an abrupt pattern of "information leakage" follows, with the result that the target company's share price begins to anticipate future public disclosures.¹⁴⁷ Therefore, the authors argue that new agency costs may arise from hedge fund activism and especially from hedge fund managers joining target company boards.¹⁴⁸

For all of the above reasons, it might be expected that we see more activist board representation campaigns in recent years, compared to the earlier years of hedge fund activism, which were explored in the aforementioned empirical studies. The combination of fewer available target companies that would be classified as "low-hanging fruit," the likely institutional investor support for activist board representation campaigns, the likelihood that activist board representation may be a necessary precondition to engaging in strategic or operational activism, and the access to information that a board seat affords, may provide credibility for the theory that activism has evolved to focus more on board representation. Therefore, more campaigns for board representation are likely, and it is

¹⁴² Kobi Kastiel & Yaron Nili, "Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite, 2017 WIS. L. REV. 19, 63–64, 66; Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971, 995–96 (2019).

¹⁴³ Hamdani & Hannes, *supra* note 142, at 995.

¹⁴⁴ *Id.*

¹⁴⁵ Kahan & Rock examined what they called the "dark side" of activism, defined as "instances where the interests of activist hedge funds conflict with those of their fellow shareholders . . ." Kahan & Rock, *supra* note 11, at 1027, 1072–77.

¹⁴⁶ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 389–90, 435, 439.

¹⁴⁷ *Id.* at 382, 386–87, 389, 408–14, 455.

¹⁴⁸ *Id.* at 385.

predicted that these campaigns may often be successful, especially if there is widespread institutional investor support for such campaigns.

2. *Investment Horizon*

Part I explored the narrative that activist hedge funds are short-term actors. Leo Strine has recently noted that “[t]he rise that most hedge funds seek must occur within a relatively short time period, because many activist hedge funds have historically retained their positions for only one to two years at most.”¹⁴⁹ However, activists themselves have emphasized that they take longer-term positions in companies when they secure board representation. For example, Jeffrey Ubben, the former head of ValueAct Capital, noted that “[i]n firms where it has board seats ValueAct holds its positions for two to four years”¹⁵⁰ Similarly, Nelson Peltz, the founder of Trian Partners, has stated that “[w]e are accused of being short term investors. But the average length of stay in an investment is five years. At Fidelity it’s 18 months”¹⁵¹

Previous empirical studies have estimated the average or median investment duration of activist hedge fund campaigns. In Brav, Jiang, Partnoy, and Thomas’ study of activist events from 2001 to 2006, which is the most highly cited study, the median investment period for completed activist hedge fund interventions was approximately one year, with an overall duration of all the events (including those that were ongoing and had not been exited yet) being closer to twenty months.¹⁵² This figure is repeated in much of the subsequent and recent literature on hedge fund activism to exemplify the point that activist hedge funds are short-termist and will rarely stay invested in target companies beyond two years.¹⁵³

Most of the other key studies published in the 2000s did not specifically measure investment duration. One that did was Boyson and Mooradian’s study of activist campaigns between 1994 and 2005.¹⁵⁴ Here, they divided campaigns “into three categories: communication only (or ‘investment

¹⁴⁹ *Who Bleeds*, *supra* note 1, at 1892.

¹⁵⁰ *An Investor Calls*, ECONOMIST: BRIEFING (Feb. 7, 2015), <https://www.economist.com/briefing/2015/02/05/an-investor-calls>.

¹⁵¹ *Who Bleeds*, *supra* note 1, at 1892 n.71 (citing Kerry A. Dolan, *Trian’s Nelson Peltz on Why He’s a Nicer Investor than People Think*, FORBES (June 21, 2016, 9:00 AM), <https://www.forbes.com/sites/kerryadolan/2016/06/21/trians-nelson-peltz-on-why-hes-a-nicer-investor-than-people-think/?sh=5742293b4f95>).

¹⁵² *Hedge Fund Activism*, *supra* note 83, at 1731–32.

¹⁵³ For example, *Who Bleeds*, *supra* note 1, at 1892 & n.70 cites this data in support of the proposition that “many activist hedge funds have historically retained their positions for only one to two years at most,” and Coffee & Palia, *supra* note 14, at 566 & nn.74–77 cite this study alongside other studies to highlight that most activists “do not appear to hold for the long run” and “specialize in short-term interventions.”

¹⁵⁴ Nicole M. Boyson & Robert M. Mooradian, *Corporate Governance and Hedge Fund Activism*, 14 REV. DERIVATIVES RSCH. 169, 170 (2011).

purposes only’), communication then aggressive, and aggressive only.”¹⁵⁵ For communication only firms, the study found that the mean duration of activist campaigns was about one and one-third years. For the other two categories, the average duration of the campaigns was longer, at just over two years.¹⁵⁶

This discussion leads to the third research question and related hypothesis that are investigated in the empirical study in Part III:

Research Question 3 – Is activist board representation associated with a longer-term investment approach on the part of the activist hedge fund?

Hypothesis 3 – Activist hedge funds that successfully secure board seats are likely to stay invested in target companies longer than activists without board seats.

There are various intuitive and legal reasons why activist board representation may be associated with longer investment periods. Intuitively, if the activist is seeking board representation to propose strategic and operational changes while on the board, then these strategies are likely to take longer to implement and thus pay off financially, compared to returns of cash to shareholders where the impact is much more immediate. Another potential reason why activist hedge funds might adopt a longer-term perspective when they seek and secure board representation is a regulatory one. In the United States, a hedge fund will become an “insider” that is subject to Section 16 of the Exchange Act if it has a ten percent stock ownership or a representative on the company board under the SEC’s “director by deputization” theory.¹⁵⁷ As a result, the activist would have to disclose any change in its interest and disgorge any profits from “short-swing” trading, i.e., trading within any six-month period. This imposes some practical limitations on activist hedge funds selling stock when they hold a board seat.

There may also be restrictions on selling stock in the settlement agreements that are negotiated between activist hedge funds and target companies. For example, in some settlement agreements, it is a condition

¹⁵⁵ *Id.* at 175.

¹⁵⁶ *Id.* at 178–79.

¹⁵⁷ Securities Exchange Act of 1934 § 16, (codified at 15 U.S.C. § 78p (2012)). Cases on “director by deputization” may take into account the following factors, among others: the director regularly shares confidential information with the investor; the director has a relationship with the investor that allows the investor to influence the director’s decisions; the director has a relationship with the investor that allows the director to routinely influence the investor’s investment policy generally or with respect to the issuer; or the director performs his or her duties for the benefit of the investor rather than for the issuer.

that the activist continues to hold a certain stake in the target company in order to retain its seat on the board.¹⁵⁸

3. *Capital Commitment*

Relatedly, it might be expected that activist hedge funds would commit more capital to a target company when they have board seats, reflecting their increased commitment to the company for the longer-term. The capital committed by activist hedge funds has been reported in previous studies, but this has never before been broken down into cases where the activist hedge fund sought or secured board representation, and cases where it did not. In the study by Brav, Jiang, Partnoy, and Thomas, the median maximum ownership stake held by activist hedge funds in the sample was 9.1%, with no distinction being made between different types of campaign.¹⁵⁹ This number is expected to be higher than in my sample because it included a broader range of U.S. public companies, not just the S&P 500. Similarly, in Bratton's study, the median percentage of stock held in small capitalization companies was 9.8%, whereas for large capitalization companies (over \$5 billion in market capitalization) it was 6.7%.¹⁶⁰ Again this was not broken down into types of campaign. Primarily, my empirical study seeks to discover whether activist hedge funds commit to a higher percentage of the target company's shares when they seek and secure board representation.

This leads to the fourth research question and its related hypothesis, both of which are explored in the empirical study in Part III:

Research Question 4 – Do activist hedge funds hold larger stakes in the target company when they appoint activist directors, compared to cases where they have no board seats?

Hypothesis 4 – Activist hedge funds that seek and secure board seats may also take a larger ownership stake.

¹⁵⁸ An example of this from the United Kingdom is ValueAct's settlement agreement with Rolls-Royce, where the activist hedge fund could only retain its seat on the board provided its stake in Rolls-Royce did not fall below 7.5%. Peggy Hollinger, *Rolls-Royce Agrees ValueAct Board Deal*, FIN. TIMES (Mar. 2, 2016), <https://www.ft.com/content/3809a222-e04b-11e5-9217-6ae3733a2cd1>; Press Release, Rolls-Royce, *Rolls-Royce Appoints Bradley Singer as a Non Executive Director* (Mar. 2, 2016), <https://otp.investis.com/clients/uk/rolls-royce1/rms/regulatory-story.aspx?newsid=678255&cid=171>; Press Release, Rolls-Royce, *Summary of Key Terms in Relationship/Confidentiality Agreement Between Rolls-Royce Holdings plc, The ValueAct Group and Bradley Singer Dated 3 May 2018* (May 3, 2018), <https://www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/about/Key-Terms-of-Relationship-Agreement-with-ValueAct.pdf>.

¹⁵⁹ *Hedge Fund Activism*, *supra* note 83, at 1732.

¹⁶⁰ Bratton, *supra* note 78, at 1389.

4. Campaign Objectives

Research Question 5 – Do activist hedge funds pursue different types of strategies when they seek board representation?

A fundamental question is whether activist hedge funds are pursuing different types of strategies when they seek board representation, compared to when board representation is not sought.

i. Strategy & Operations

There are a multitude of anecdotal examples of activist hedge funds submitting detailed business plans and proposals for long-term strategic and operational improvements at target companies. In addition to Starboard Value's campaign at Darden, another well-publicized example was the proxy contest launched by Trian Partners to obtain one seat for its founder, Nelson Peltz, on the board of P&G in 2017.

P&G, with a market capitalization of around \$225 billion, was the largest company ever to be subject to a proxy contest.¹⁶¹ Trian invested \$3.5 billion in P&G, which gave the activist hedge fund a 1.5% stake in the company.¹⁶² P&G's shareholder base was somewhat unusual for an S&P 500 company as it had a more dispersed shareholder base. P&G had around three million shareholders and a high proportion of individual shareholders (generally employees or former employees).¹⁶³ During the campaign, Trian put forward a ninety-three-page whitepaper entitled "Revitalize P&G Together,"¹⁶⁴ which detailed the issues it sought to correct at P&G through its campaign.

Unusually, Martin Lipton, a vocal opponent of hedge fund activism, highlighted that the P&G whitepaper was unique in many ways: as Trian was seeking to promote sustainable long-term investment and growth, it was not seeking to break up P&G, and was not seeking to cut pensions, reduce Research and Development ("R&D"), marketing expense, or capital expenditures. Additionally, Trian was not proposing to replace P&G's current

¹⁶¹ Julie Creswell, *Nelson Peltz Declares Victory in Procter & Gamble Proxy Fight*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/business/procter-gamble-nelson-peltz.html>. This was not P&G's first experience as the target of hedge fund activism. See Jessica Wohl, *Procter & Gamble Brings Back Former CEO to Fix Company*, REUTERS (May 23, 2013, 9:02 PM), <https://www.reuters.com/article/us-procter-ceo/procter-gamble-brings-back-former-ceo-to-fix-company-idUSBRE94M1AW20130524> (discussing how in 2013 Procter & Gamble succumbed to pressure from Pershing Square to replace the chairman and CEO of the company with the former chairman and CEO).

¹⁶² Adam Hartung, *The Case for Trian's Nelson Peltz Joining P&G's Board*, FORBES (Oct. 31, 2017, 10:13 AM), <https://www.forbes.com/sites/adamhartung/2017/09/07/the-case-for-trians-peltz-joining-the-pg-board/>.

¹⁶³ PROCTER & GAMBLE, 2017 ANNUAL REPORT 9 (2017); Svea Herbst-Bayliss & Siddharth Cavale, *Procter & Gamble Foresees Proxy War Victory, Peltz Refuses to Concede*, REUTERS (Oct. 10, 2017, 3:06 PM), <https://www.reuters.com/article/business/procter-gamble-foresees-proxy-war-victory-peltz-refuses-to-concede-idUSKBN1CFOCE/>.

¹⁶⁴ TRIAN PARTNERS, *supra* note 6.

CEO or any directors.¹⁶⁵ P&G itself had already engaged in many of the techniques that hedge fund activists are traditionally criticized for, including layoffs, share buybacks, dividend increases, and substantial cost cutting.¹⁶⁶

This anecdote serves to illustrate some of the theory motivating the next hypothesis. As demonstrated by the P&G whitepaper, activist hedge funds have the expertise and resources to conduct extensive research on target companies from outside of the boardroom. They can then present their proposals to management and to investors through their whitepapers. However, unlike financial or balance sheet activism, it would be very difficult for an activist hedge fund to implement any strategic or operational proposals from outside of the boardroom. Doing so requires access to the board and to management. Therefore, a board seat would seem to be a necessary precursor to executing change of this nature. This leads to the following hypothesis:

Hypothesis 5a – Activist board representation may be accompanied by more substantive strategic and operational activist strategies rather than the financial engineering that activist hedge funds are commonly criticized for engaging in.

ii. Balance Sheet Activism

Related to the general question posed in Research Question 5 above, the empirical study also investigates whether balance sheet activism is less prevalent in cases where activist hedge funds seek and secure board seats. Again, the intuition is that a strategy involving balance sheet activism would be less likely to accompany requests for board seats. There are several reasons for this. One is that if balance sheet activism were the only goal, it would not be necessary for the activist hedge fund to secure a board seat in order to succeed in its campaign. The company's cash position can be analyzed from outside of the boardroom and the activist hedge fund would not need special access to inside information in order to implement this strategy in practice. Rather, it would simply be a case of whether the company management were willing to accede to this demand or not. Moreover, as noted earlier, longer-term institutional investors may not be supportive of hedge funds pursuing financial or balance sheet activism as a primary campaign strategy, and it also may be the case that targets classified as low-hanging fruit in this respect are diminishing or non-existent. Overall, this analysis leads to the following hypothesis:

¹⁶⁵ Martin Lipton, *The Trian/P&G Proxy Contest*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 11, 2017), <https://corpgov.law.harvard.edu/2017/09/11/the-trianpg-proxy-contest/>.

¹⁶⁶ Anna Nicolaou & Scheherazade Daneshkhu, *The Hedge Fund, the CEO and the Fight for P&G's Future*, FIN. TIMES (Oct. 13, 2017), <https://www.ft.com/content/a4c4d59e-aff7-11e7-beba-5521c713abf4>.

Hypothesis 5b – Activist hedge funds may be less likely to engage in financial or balance sheet activism when they seek or secure board representation.

5. *CEO Turnover*

The next research question concerns CEO turnover and is as follows:

Research Question 6 – Are target company CEOs more often replaced when an activist hedge fund secures board representation?

In 2008, Brav, Jiang, Partnoy, and Thomas argued that “hedge fund activism is not kind to CEOs of target firms.”¹⁶⁷ In particular, they discovered that during the year after an activist hedge fund campaign is announced, the CEO turnover rate increases by almost ten percentage points and average CEO compensation declines by approximately \$1 million.¹⁶⁸ More recently, reports on activist campaigns by organizations such as Lazard have revealed that CEO turnover is higher at companies targeted by activists. For example, in a report by Lazard in 2017, it is noted that CEO turnover at activist targets averaged 23% compared to 12% for non-targets.¹⁶⁹ Similarly, the study by Bebchuk, Brav, Jiang, and Keusch on activist settlement agreements outlines that although only 3% of settlement agreements provide for the CEO’s departure as a contract term, 18.6% of CEOs depart within a year of the relevant settlement agreement.¹⁷⁰

Logically, activist hedge funds may need a representative on the board and certain key committees in order to contribute in a meaningful way to discussions for a replacement CEO. Therefore, intuitively it might seem likely that CEO turnover would be higher when an activist hedge fund seeks and secures board representation. This leads to the following hypothesis:

Hypothesis 6 – Activist board representation may be associated with CEO departures, as a board seat may be helpful for an activist hedge fund to successfully oust the CEO.

6. *Types of Activist Director*

Activist director nominees can either be affiliated directors who work at the activist hedge fund, or non-affiliated directors who are selected by the

¹⁶⁷ *Hedge Fund Activism*, *supra* note 83, at 1732.

¹⁶⁸ *Id.*

¹⁶⁹ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 388 n.10 (citing LAZARD’S SHAREHOLDER ADVISORY GROUP, REVIEW OF SHAREHOLDER ACTIVISM–3Q 2017 1 (2017)).

¹⁷⁰ Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, HARV. JOHN M. OLIN DISCUSSION PAPER SERIES, no. 906, 2017, at 16, 50 tbl.4.

hedge fund, often due to their depth of business acumen in a particular industry or due to an impressive track record in executing corporate turnarounds. Studies of hedge fund activism in the early 2000s showed that it was much more common in the past for affiliated directors to be appointed. For example, in a dataset of activist campaigns from 2002 to 2006, it was noted that when activists gained seats on the board, 81% of those joining the board were activist fund principals with only 19% of directors appointed by activist hedge funds being non-affiliated.¹⁷¹ More recent studies have continued to emphasize the prevalence of hedge fund employees on director slates. For example, in a study conducted by Coffee, Jackson, Mitts, and Bishop that analyzed 475 settlement agreements between target companies and activist hedge funds, they found that “[a]pproximately 70% of fund-nominated director slates include a hedge fund employee.”¹⁷²

There have been criticisms of activist hedge fund managers joining the boards of companies. One commonly asserted criticism is that activist hedge fund managers are highly unlikely to have a better idea of how to run a company than the incumbent directors.¹⁷³ It is argued that many activist hedge fund managers, perhaps experts in financial structuring and governance, may lack the experience to serve on a corporate board and may not have the industry expertise that is often required.¹⁷⁴ When seeking board representation and nominating directors, activist hedge funds may choose whether to propose their own investment managers as candidates or to put forward non-affiliated experienced industry executives. They often put forward a combination of the two if they are seeking multiple board seats.

Another dark side of activist hedge fund managers themselves joining the board relates to the earlier critique by Coffee, Jackson, Mitts, and Bishop regarding information leakage.¹⁷⁵ One of the main empirical findings of their study on activist settlements was that “[t]he increased leakiness is strongly associated with the appointment of directors who are also employees of the activist investor as opposed to the industry experts typically appointed to the target’s board pursuant to an activist settlement.”¹⁷⁶

Given the various advantages and disadvantages of affiliated versus non-affiliated activist-appointed directors, this leads to the following research question:

¹⁷¹ Bratton, *supra* note 78, at 1412.

¹⁷² Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 381–82.

¹⁷³ See Stephen M. Bainbridge, *Preserving Director Primacy by Managing Shareholder Interventions*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 231, 232 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (noting that some shareholder interventions “are motivated by an activist’s belief that he or she has better ideas about how to run the company than the incumbents, which may be true sometimes but often seems dubious”).

¹⁷⁴ Yaron Nili, *Servants of Two Masters? The Feigned Hysteria over Activist-Paid Directors*, 18 U. PA. J. BUS. L. 509, 540 (2016).

¹⁷⁵ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 391.

¹⁷⁶ *Id.*

Research Question 7 – Are most activist directors appointed by activist hedge funds affiliated with the hedge fund, or are they non-affiliated directors?

The hypothesis here is that the evolution of hedge fund activism has led to pressure on activist hedge funds to appoint a higher proportion of non-affiliated directors to corporate boards, although it is anticipated that this may vary by hedge fund.

Hypothesis 7 – Activist hedge funds are more likely to appoint non-affiliated directors, rather than affiliated directors.

7. *Activist Settlements*

Research Question 8 – Are most activist directors appointed through negotiated settlement agreements or through proxy contests?

Another research question explored is whether activist board representation is most commonly secured through a proxy contest or through a settlement agreement negotiated between the activist hedge fund and the target company.

Hypothesis 8 – Activist board representation is more likely to be secured through settlement agreements rather than proxy contests.

Here, the hypothesis is that board representation is more likely to be secured through settlement agreements, rather than the campaign for board representation proceeding to a proxy contest and full shareholder vote. The upward trend in activist settlements was indeed reported in a recent paper by Bebchuk, Brav, Jiang, and Keusch. In that paper, the authors conducted a study of activist settlement agreements between 2000 and 2015 and found that “[w]hile such settlements used to be rare, they now occur with significant frequency.”¹⁷⁷ Although their data applied to a broader range of companies and activists and did not focus specifically on activist board representation, it is expected that my data would also reflect this general trend and reveal a similar pattern. Specifically, the authors found that activists formally start a proxy contest in 12% of activist campaigns, with only 38% of those cases then proceeding to a full shareholder vote.¹⁷⁸ Similarly, relying on studies by Lazard, Coffee, Jackson, Mitts, and Bishop have noted that “the vast majority of the directors placed on the board as a result of activist pressure is appointed through privately negotiated settlements, thus allowing management to avoid

¹⁷⁷ *Dancing with Activists*, *supra* note 10, at 2.

¹⁷⁸ *Id.* at 6.

the risk of a proxy contest.”¹⁷⁹ The Lazard data showed that after 2014, the proportion of board seats won via settlements rather than proxy contests increased considerably from 66% in 2014 to 84% in 2015, 88% in 2016, and 86% in 2017.¹⁸⁰ In their own study of settlement agreements between 2000 and 2015, Coffee, Jackson, Mitts, and Bishop reported that “[t]he period 2011–2015 saw a substantial increase in the number of settlements with activist investors, and the first public criticisms by diversified institutional investors of activist behavior.”¹⁸¹

Settlement agreements are a less adversarial mechanism through which activist hedge funds can achieve their goals. The increased prevalence of negotiated settlements may therefore reflect a less adversarial and more collaborative approach to activism on the part of both the activists and the target companies. While a proxy contest is necessarily hostile, a settlement agreement can be seen as a collaborative or cooperative alternative.¹⁸² Settlement agreements involve concessions by the activist and by the target company. Ordinarily, the activist will agree to a “standstill,” refraining from pursuing further activist activities, and sometimes also prohibiting the activist from acquiring additional stock.¹⁸³ In return, the target company will accede to some of the activist’s demands, for example, by agreeing to appoint candidates nominated by the activist fund to the target company board.¹⁸⁴

More cynically, one could view settlements as incumbent managers following the path of least resistance in seeking to avoid adverse publicity or a defeat in a proxy contest, or hoping to retain their executive positions if they appease hedge fund activists with board seats. Scholars have criticized this “backroom deal-making”¹⁸⁵ and have stated that “[s]killed at spin control, management would rather settle than fight.”¹⁸⁶ Long-term institutional investors have also criticized settlement agreements between activist hedge funds and corporate management, arguing that they can be disenfranchised through this process.¹⁸⁷ Here, the short-term versus long-term arguments usually come into play, which also illustrates the significance of the concerns over activist hedge fund short-termism to other investors. Concerns of disenfranchisement were initially raised by global

¹⁷⁹ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 388 (citing LAZARD SHAREHOLDER ADVISORY GROUP, REVIEW OF SHAREHOLDER ACTIVISM – Q1 2018 I (2018)).

¹⁸⁰ LAZARD, 2018 REVIEW OF SHAREHOLDER ACTIVISM 8 (2018), <https://www.lazard.com/research-insights/annual-review-of-shareholder-activism-2018/>.

¹⁸¹ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 390–91.

¹⁸² *Dancing with Activists*, *supra* note 10, at 4.

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 12–17 (discussing findings that settlement terms tended to focus on board composition).

¹⁸⁵ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 389.

¹⁸⁶ *Id.* at 395.

¹⁸⁷ Rakhi Kumar & Ron O’Hanley, *Protecting the Interests of Long-Term Shareholders in Activist Engagements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 17, 2016), <https://corpgov.law.harvard.edu/2016/10/17/protecting-the-interests-of-long-term-shareholders-in-activist-engagements/>.

asset managers in 2016, most vocally by State Street Global Advisors. Their concerns were repeated again more recently, where they highlighted that “[o]ver a three year period from 2016–2018, 84% of board seats gained by activists were conceded through settlement agreements; a 15% increase over the 2013–2015 period levels, where 73% of seats were conceded through settlement agreements.”¹⁸⁸ Large asset managers and other long-term investors continue to emphasize the importance of target boards engaging with them when an activist campaign is initiated.¹⁸⁹ One example is in BlackRock’s Larry Fink’s Letter to CEOs in 2018, where he urged companies to engage with long-term shareholders early and bring other critical stakeholders to the table when activists offer valuable ideas.¹⁹⁰

Regardless of the underlying motives of target company management, or the opinions of institutional investors, it seems that activists are becoming increasingly successful at swiftly obtaining board representation through settlements with target companies. Companies sometimes emphasize that they are working cooperatively with activists and often reach agreements with activists during the early stages of intervention. One example is JANA Partners’ agreement with Tiffany & Co. to add three non-affiliated directors to the Tiffany board, which was announced before the market was even aware that the activist was a 5% shareholder.¹⁹¹

The addition of activist directors is a very common condition of settlement agreements. Bebchuk, Brav, Jiang, and Keusch’s study which considered activist settlement agreements from 2000 (because settlements were rare before 2000) to 2013, noted that almost 84% of settlements stipulate the addition of new directors.¹⁹² More unusually, some companies have even gone so far as to invite activist intervention or activist directors. For example, General Electric’s CEO Jeff Immelt invited activist Nelson Peltz of Trian Partners—which did not own shares in the company—to become involved in GE. Trian ultimately invested \$2.5 billion, which was

¹⁸⁸ STATE STREET GLOBAL ADVISORS, *supra* note 132, at 1–2.

¹⁸⁹ Michael Flaherty, *Big Funds Push Back Against Activist Investor Settlements*, REUTERS (July 18, 2016, 3:22 PM), <https://www.reuters.com/article/us-activist-investors-idUSKCN0ZY2DP>.

¹⁹⁰ Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), <https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/> [hereinafter 2018 Letter from Larry Fink] (stating “[w]here activists do offer valuable ideas—which is more often than some detractors suggest—we encourage companies to begin discussions early, to engage with shareholders like BlackRock, and to bring other critical stakeholders to the table. But when a company waits until a proxy proposal to engage or fails to express its long-term strategy in a compelling manner, we believe the opportunity for meaningful dialogue has often already been missed”).

¹⁹¹ Michael Flaherty, *Tiffany Adds Three Directors in Pact with Activist JANA*, REUTERS (Feb. 21, 2017, 5:24 PM), <https://www.reuters.com/article/us-tiffany-jana-idUSKBN1601AC> (“The deal with JANA jolted the company’s stock and came before the market was even aware the hedge fund was a shareholder.”).

¹⁹² *Dancing with Activists*, *supra* note 10, at 4, 14 tbl.5.

its biggest investment to date at the time, and an affiliated representative of Trian Partners joined the board.¹⁹³

There are various reasons why target companies may choose to settle rather than allow the activist campaign to proceed to a proxy contest and shareholder vote. The first is cost and time. Proxy contests are expensive and consume a lot of management time. In the United States, running a proxy contest for board representation can prove to be incredibly costly (both for the activist and the target company). Indeed, more than ten years ago the average cost of a proxy fight in the United States was believed to be in excess of \$10 million.¹⁹⁴ Trian's proxy contest at P&G was reported as the most expensive in history, costing Trian \$25 million, with P&G reportedly spending anywhere between \$35 million and \$100 million on its defense.¹⁹⁵ Another motivation for target company managers and directors to settle with an activist may be to try to preserve their own positions by appeasing the activist. Coffee, Jackson, Mitts, and Bishop argue that "the CEO's job is imperiled, unless he or she settles."¹⁹⁶

III. ACTIVIST BOARD REPRESENTATION: AN EMPIRICAL STUDY

A. *Sample Construction and Data Description*

1. *Hedge Fund Activism at S&P 500 Companies*

This study analyzes activist hedge fund campaigns at S&P 500 companies in the period from 2010 to 2019. Although S&P 500 companies make up approximately 14% of the total number of public companies in the United States,¹⁹⁷ they represent over 80% of the total market capitalization

¹⁹³ David Benoit, *Activism's Long Road from Corporate Raiding to Banner Year; Change in Tactics Let Industry Move Beyond Controversial Past*, WALL ST. J. ONLINE (Dec. 26, 2015), <https://www.wsj.com/articles/activisms-long-road-from-corporate-raiding-to-banner-year-1451070910>. Trian later invested \$3.5 billion in P&G. Michael Flaherty, *Trian Takes \$3.5 Billion Stake in Procter & Gamble*, REUTERS (Feb. 14, 2017, 7:00 PM), [https://www.reuters.com/article/business/trian-takes-35-billion-stake-in-procter-gamble-idUSKBN15T35E/#:~:text=\(Reuters\)](https://www.reuters.com/article/business/trian-takes-35-billion-stake-in-procter-gamble-idUSKBN15T35E/#:~:text=(Reuters)).

¹⁹⁴ Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, 611 (2013) (noting that "a campaign ending in a proxy fight has average costs of \$10.71 million").

¹⁹⁵ Hartung, *supra* note 162; Chris Isidore & David Goldman, *Procter & Gamble Declares Victory in Expensive Proxy Fight*, CNN (Oct. 10, 2017, 11:49 AM), <https://money.cnn.com/2017/10/10/news/companies/procter-gamble-proxy-fight/index.html>. See also Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 927-34 (2021) (outlining the cost of Engine No. 1's proxy contest at ExxonMobil).

¹⁹⁶ Coffee, Jackson, Mitts & Bishop, *supra* note 120, at 388. The CEO's job may also be imperiled even if they do settle. See *supra* Part II.B.5.

¹⁹⁷ See S&P DOW JONES INDICES, S&P 500 (CLP) (Sept. 30, 2024), https://www.spglobal.com/spdji/en/idsenhancedfactsheet/file.pdf?calcFrequency=M&force_download=true&hostIdentifier=48190c8c-42c4-46af-8d1a-0cd5db894797&languageId=1&indexId=92465107 [hereinafter S&P 500 FACTSHEET] (representing that there are 504 S&P 500 companies); FT WILSHIRE, FT WILSHIRE 5000 INDEX 1 (June 30, 2021), <https://assets-global.website-files.com/60f8038183eb84c40e8c14e9/6132007be5f0a49e7a5f>

of the entire U.S. stock market.¹⁹⁸ Therefore, the most economically significant companies are constituents of the S&P 500 index.

The decision to focus exclusively on S&P 500 companies¹⁹⁹ is a departure from the prior empirical literature on hedge fund activism, which has generally analyzed activism at a wider range of U.S. public companies.

i. Prior Hedge Fund Activism Datasets

It is useful to compare the dataset in my study to previous datasets of hedge fund activist campaigns. The datasets used in prior empirical studies on hedge fund activism are summarized in the table below:

Table 1 – Prior Empirical Studies of Hedge Fund Activism

This table shows the sample years, total activist events, and total target companies in the samples studied in the most often cited prior empirical studies of hedge fund activism.

Paper	Sample Years	Total Activist Events	Total Target Companies
Brav, Jiang, Partnoy & Thomas (2008) ²⁰⁰	2001 – 2006	548	

652a_fit-wilshire-5000-fact-sheet.pdf [hereinafter WILSHIRE 5000 FACT SHEET] (noting that there are 3,544 listed companies in the United States with readily available price data). Reference is often also made to the Russell 3000 index, which represents approximately 98% of the investable U.S. equity market. FTSE RUSSELL, RUSSELL 3000 INDEX 1 (Aug. 31, 2024), <https://www.ftserussell.com/analytic/s/factsheets/home/search> (search “Russell 3000”).

¹⁹⁸ S&P 500 FACTSHEET, *supra* note 197.

¹⁹⁹ See *infra* Part III.A.1.ii for a discussion on the rationale behind focusing on the S&P 500.

²⁰⁰ Compiled by purchasing a list of Schedule 13D filings made by activist hedge funds at U.S. public companies between 2001 and 2006. Brav, Jiang, Partnoy & Thomas, *Hedge Fund Activism*, *supra* note 83, at 1737 (noting that the authors purchased a list of all Schedule 13D filers during the period 2001 to 2006 from LiveEdgar and then manually filtered out the non-hedge fund filers). This generated a sample of 1,059 activist events (548 actively/publicly pursued campaigns and 511 passive/private campaigns) at 882 unique target companies. *Id.* at 1739, 1741–42. The final sample in this dataset comprised 1,059 hedge fund-target pairs at 882 unique target companies. However, this sample included 511 events where there was no active campaign to achieve specific goals, leaving 548 active campaigns at an unspecified number of target companies. *Id.* at 1741–42. The Brav, Jiang, Partnoy, and Thomas dataset has been further extended and analyzed in subsequent papers. For example in a law review article by Bebchuk, Brav, and Jiang, an extended version of the dataset covering campaigns from 1994 to 2007 was referred to. See Bebchuk, Brav & Jiang, *supra* note 33, at 1098; *Dancing with Activists*, *supra* note 10 (citing Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *supra* note 78). An updated version of the dataset involving “4,657 hedge fund activist events spanning the time period 1994 through 2018” is also referenced in a 2022 working paper by Brav, Jiang, and Li. See *Governance by Persuasion*, *supra* note 82, at 4.

Clifford (2008) ²⁰¹	1998 – 2005	788	
Klein & Zur (2009) ²⁰²	2003 – 2005	151	
Bratton (2007) ²⁰³	2002 – mid-2006	130	130
Greenwood & Schor (2009) ²⁰⁴	Q3 1993 – Q3 2006	784	
Briggs (2007) ²⁰⁵	2005 – mid-2006		52
Boyson & Mooradian (2011) ²⁰⁶	1994 – 2005	418	397

As shown in the table above, all of these studies focused on activist hedge fund campaigns up to 2005 or 2006, making the data nearly twenty years old. This emphasizes the need for a study of the evolution of hedge fund activism and a fresh analysis of modern-day techniques utilized by activist hedge funds at the most economically significant companies in the United States.

ii. Focus on the S&P 500

There were various rationales for my decision to focus on S&P 500 companies and to depart from the data collection methods in prior literature. With respect to the focus on S&P 500 companies, prior literature found that hedge fund activists tend to target smaller companies. For example, Bratton noted that “hedge funds concentrate their attention on the small capitalization sector”²⁰⁷ and Brav, Jiang, Partnoy, and Thomas found in their widely cited study that “hedge funds are less likely to target larger firms

²⁰¹ See Clifford, *supra* note 83, at 326 (utilizing Schedule 13D filings and yielding a sample of 788 activist events between 1998 and 2005).

²⁰² Klein & Zur, *supra* note 83, at 187 (examining Schedule 13D and 13D/A filings of 151 activist events between 2003 and 2005). Here, the sample was considerably smaller due to the three-year date range and because the dataset was restricted only to instances where activist hedge funds had filed Schedule 13Ds and cases where they had actively and publicly pursued campaigns. *Id.* at 195.

²⁰³ Bratton, *supra* note 78, at 1385 (utilizing press releases to create a sample of activist events at 130 firms from January 1, 2002, to June 30, 2006).

²⁰⁴ Greenwood and Schor constructed a dataset of activist filings with the Securities and Exchange Commission (“SEC”) (Schedule 13D and DFAN14A filings, which are filed with the SEC by investors who intend to or are engaged in a proxy fight with a firm’s management) from 1993 to 2006, consisting of 784 activist events initiated by 139 hedge funds. Greenwood & Schor, *supra* note 83, at 364. Events were defined as “instance[s] in which an activist files a 13D filing announcing 5% ownership and an intention to influence the management of the company.” *Id.* at 365 tbl.1.

²⁰⁵ Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 695 (2007) (compiling hand-gathered SEC filings for activist campaigns which took place in 2005 and the first eight months of 2006). This resulted in a sample of fifty-two activist targets. *Id.* at 696.

²⁰⁶ Boyson & Mooradian, *supra* note 154, at 170 (covering 13D filings from 1994 to 2005 including 418 activist events involving 111 hedge funds and 397 target firms).

²⁰⁷ Bratton, *supra* note 78, at 1387.

because the fund would need to invest a large amount of capital in order to amass a meaningful stake.”²⁰⁸

Reliance on these empirical studies from the 2000s has led to a general perception that hedge fund activism continues to primarily focus on smaller companies to the present day. This can sometimes also be used as an argument to downplay the impact of hedge fund activism. Brian Cheffins states in his 2018 book, *The Public Company Transformed*, that “Gilson and Gordon likely overestimate the clout of activist hedge funds, which is significant but has been compromised from a governance perspective by the continued bias in favor of targeting smaller companies as well as by the episodic nature of hedge fund interventions.”²⁰⁹ However, as my empirical study shows, since the empirical studies documenting activism in the 2000s, activist hedge fund behavior has changed considerably. The largest and most prominent activist hedge funds have increasingly targeted some of the biggest companies in the United States.²¹⁰

This Article fills a gap in the literature by analyzing the previously unexplored hedge fund activism at S&P 500 companies. It is undoubtedly true, as Martin Lipton states, that “no company should consider itself immune from activism. No company is too large, too new or too successful.”²¹¹ The empirical data presented here can also help to avoid caveats that were necessary in very recent academic scholarship. For example, in Coffee and Palia’s survey in 2016, it was necessary to caveat that the studies did not cover data later than 2007 and that hedge fund activism had substantially changed in the intervening time.²¹²

A reliance on studies that primarily focus on smaller companies and that analyze hedge fund behavior prior to more recent changes in such behavior may be of limited usefulness and could even result in a misrepresentation of current activist hedge fund behavior. As illustrated in Part I, the narrative on activist short-termism is strong. Therefore, it is important to have a clear picture of the current activities of activist hedge funds at the most economically significant companies in order to assess whether accusations of short-termism are well-founded or not.

²⁰⁸ *Hedge Fund Activism*, *supra* note 83, at 1752.

²⁰⁹ CHEFFINS, *supra* note 15, at 372. Cheffins does also note that “[c]aveats aside, hedge fund activism has been a meaningful shareholder value catalyst and likely will remain so for the foreseeable future.” *Id.*

²¹⁰ *See infra* Part III.B.1.ii.

²¹¹ Martin Lipton, *Dealing with Activist Hedge Funds and Other Activist Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 2, 2022), <https://corpgov.law.harvard.edu/2022/09/02/dealing-with-activist-hedge-funds-and-other-activist-investors-5/>; Martin Lipton, *Dealing with Activist Hedge Funds and Other Activist Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 6, 2021), <https://corpgov.law.harvard.edu/2021/10/06/dealing-with-activist-hedge-funds-and-other-activist-investors-4/>.

²¹² Coffee & Palia, *supra* note 14, at 54 (“[A]ll of these studies end generally no later than hedge fund interventions initiated in 2007. Since that time, hedge fund activism has accelerated substantially and altered its targets, thus having impacts that these studies may not capture.”).

In addition to documenting recent trends of activists targeting large companies, compiling a dataset of activist campaigns at S&P 500 companies enables a focus on the most economically significant companies and the most prolific, high-profile activist hedge funds in the United States. These companies and activists are the most likely actors to have an outsized (positive or negative) impact on stakeholders and society more generally. As noted above, the S&P 500 is significant as these companies represent over eighty percent of the total market capitalization of the U.S. stock market. It also follows that activism at such companies would similarly have an outsized impact on the economy at large. As one example of the stakeholder impact, S&P 500 companies employ approximately seventy percent of the overall workforce of Russell 3000 companies.²¹³ Further, on a global scale, large U.S. companies tend also to have an outsized role in the global economy. In 2022, 5 of the top 10 largest companies in the world were U.S. companies, and 40 of the top 100 companies ranked by sales, profits, assets, and market value were American.²¹⁴ For publicly traded companies ranked by market capitalization, 63 of the largest 100 companies were U.S. companies.²¹⁵

As S&P 500 companies are likely to have the biggest impact on stakeholders and the global economy, it is useful to study activist campaigns at these firms separately. Activism at small-cap companies can be quite different from activism at large-cap companies. The players involved also often tend to be different. For example, my data shows that there is only a small group of very large activist hedge funds that target S&P 500 companies.²¹⁶ On the other hand, a much broader range of activist hedge funds target smaller companies.²¹⁷ To avoid averaging out results that then present a distorted picture of what actually happens at the largest companies, it is helpful to study the biggest companies in the United States separately to

²¹³ See *Who Bleeds*, *supra* note 1, at 1886 & n.50 (“[H]owever attractive it is for politicians to talk about small business being the engine for job growth, the reality remains that public companies are the most vital source of jobs in our economy.”).

²¹⁴ Forbes, *Forbes Global 2000 List 2022: The Top 200*, <https://www.forbes.com/sites/forbesstaff/2022/05/12/forbes-global-2000-list-2022-the-top-200/?sh=465d096b3290> (last visited Oct. 16, 2024); see also CHEFFINS, *supra* note 15, at 10 (stating that U.S. companies accounted for 38 of the top 100 companies by revenue in 2017).

²¹⁵ PWC, *GLOBAL TOP 100 COMPANIES - BY MARKET CAPITALISATION 8 (2022)*, <https://www.pwc.com/gx/en/audit-services/publications/top100/pwc-global-top-100-companies-by-market-capitalisation-2022.pdf>; see CHEFFINS, *supra* note 15, at 357 (showing that American companies comprised 55 of the top 100 in 2017 and 35 of the top 100 in 2008).

²¹⁶ See *infra* Part III.B.1. & Table 3 (showing that only thirteen activist hedge funds initiated more than one board representation campaign at an S&P 500 company in the ten years from 2010 to 2019 and that six activist hedge funds were responsible for more than two-thirds of all activist board representation campaigns at S&P 500 companies).

²¹⁷ For example, there were 197 distinct activist hedge funds in the Clifford study, 139 distinct activist hedge funds in the Greenwood & Schor study, and 111 distinct hedge funds in the Boyson & Mooradian study. Clifford, *supra* note 83, at 326; Greenwood & Schor, *supra* note 83, at 364; Boyson & Mooradian, *supra* note 154, at 175.

obtain a clear picture of what form hedge fund activism takes at these important companies.

Despite the wider general remit of earlier papers, one key paper did separately mention the importance of activism at major companies and by high-profile activist hedge funds. Bebuchuk, Brav, Jiang, and Keusch included tables of activist campaign data at “notable targets” and by “notable activists.”²¹⁸ This data more closely resembles the activists and target companies in my study, although there is only an overlap of three years between our sample periods.

Regarding the data collection methods, precisely following the data collection methodologies in the prior foundational literature—where the datasets were compiled by purchasing lists of Schedule 13D filings—would have resulted in a significant number of high-profile modern-day activist hedge fund campaigns at S&P 500 companies not being captured in the initial data gathering process. In the 2000s, this methodology made sense as the logical starting point because activist hedge fund campaigns at large-cap companies were very rare. However, as discussed above, in the past decade activist hedge funds have increasingly targeted higher profile economically significant large-cap S&P 500 companies. The larger market capitalization of these companies results in the activists generally holding a lower percentage of the target company shares, compared to the percentage held at small or mid-cap companies—often below the five percent level which triggers the requirement to file a Schedule 13D.²¹⁹ Therefore, an alternative starting point for data collection was necessary for my study to ensure that those important cases would be appropriately captured.

2. Data Collection

My study analyzes activist hedge fund events during a ten-year period from January 1, 2010, until December 31, 2019. Given the hypothesis and anecdotal evidence that activist hedge fund strategies have evolved considerably in recent years, the date range of 2010 to 2019 was chosen to reflect the most recent activist campaigns and the most relevant, up-to-date, activist hedge fund strategies. This is an important contribution to the literature by virtue of the recent nature of the campaigns alone, as it is the

²¹⁸ *Dancing with Activists*, *supra* note 10, at 6, 35 tbl.A.1, 36 tbl.A.2 (defining “notable targets” as firms with a market capitalization of \$7 billion and above, and “notable activists” as activists with four or more interventions between 2000 and 2013).

²¹⁹ In Brav, Jiang, Partnoy & Thomas’ sample, it was noted that “[r]elatively few targeted companies are large-cap firms, which is not surprising given the comparatively high cost of amassing a meaningful stake in such a target.” *Hedge Fund Activism*, *supra* note 83, at 1730. The Klein & Zur study and the Greenwood & Schor study also omit activism below the five percent reporting threshold. See Klein & Zur, *supra* note 83, at 195; Greenwood & Schor, *supra* note 83, at 364.

most up-to-date study of the constantly evolving phenomenon of hedge fund activism.²²⁰

Moreover, my study is the first to provide an in-depth comparison of activist board representation campaigns with non-board-level campaigns. In this respect, it was desirable to focus on the most up-to-date campaigns as board-level activist campaigns were rare at S&P 500 companies prior to 2010.²²¹ A cut-off of December 31, 2019, was used for the activist intervention to have begun. To provide the fullest data for investment duration, activist hedge fund exits were recorded up to June 30, 2022.

i. List of S&P 500 Companies

As the S&P 500 index is regularly reconstituted, the first step of the data collection process involved constructing a comprehensive list of all companies that were constituents of the S&P 500 during the sample period. This involved manually compiling a list of companies that were constituents of the S&P 500 at some point during 2010 to 2019 using publicly available sources that identified the date each specific company was added to or removed from the S&P 500 index.²²² The original resource used for this purpose contained some duplicates (for example when companies had changed name), so the information was manually checked against other publicly available lists of S&P 500 companies and verified with Google searches of each specific company. This exercise resulted in a final list of 700 unique S&P 500 constituent companies, which were recorded together with the date each company was added to or removed from the S&P 500 index.

ii. Activist Campaigns

Once the list of S&P 500 constituent companies was complete, the second step was to conduct searches to determine whether there had been activist campaigns at these companies. In order to be included in the dataset, the activist campaign had to have taken place at a company that was in the S&P 500 at the time the activist campaign began. I used a professional database of shareholder activism events—Activist Insight (Insightia),²²³ rather than purchasing lists of Schedule 13D filings—to generate a

²²⁰ The most up-to-date empirical studies on hedge fund activism tend to study data up to the first half of the 2010s. For example, Krishnan, Partnoy, and Thomas used a large dataset of hand-collected information on activist interventions from January 1, 2008, to May 1, 2014. See C.N.V. Krishnan, Frank Partnoy & Randall S. Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise*, 40 J. CORP. FIN. 296, 296, 298 (2016). Other recently published studies, such as the comprehensive study of worldwide hedge fund activism by Becht, Franks, Grant, and Wanger, consider campaigns in the previous decade. See Becht, Franks, Grant & Wagner, *supra* note 83, at 2934 (analyzing hedge fund activism in 23 countries during the period 2000–2010).

²²¹ See *infra* Chart 4.

²²² Leo Smigel, *The S&P 500 Historical Components & Changes*, ANALYZING ALPHA (Oct. 13, 2023), <https://analyzingalpha.com/sp500-historical-components-and-changes>.

²²³ DILIGENT MARKET INTELLIGENCE, <https://www.insightia.com/> (Activist Insight is now called Diligent Market Intelligence).

preliminary list of companies targeted by activist hedge funds. The sources of information used and cross-referenced in the Activist Insight database are wider than Schedule 13D filings as they include other SEC filings (for example Activists' 13F filings), press releases, news and trade publications, and company websites.

I, therefore, conducted a search in Activist Insight for all activist campaigns at U.S. companies. The results of this search were then cross-checked against the list of the 700 S&P 500 companies (compiled in step one above). This manual process resulted in a list of 501 matches where S&P 500 companies had been the target of some form of activist intervention. This list included all recorded types of activism by any type of shareholder activist.

To account for any errors in the Activist Insight database, I then conducted extensive Google and Factiva searches on the remaining 199 companies that were to be excluded from the sample, to uncover any activist hedge fund campaigns that may not have been identified by the Activist Insight database. This process identified three additional target companies²²⁴ that had not been listed in the Activist Insight search, which were then added to give a total of 504 target companies. There was no opportunity to cross-check my dataset against any of the other datasets referred to above, as my dataset contained campaigns from 2010 to 2019, and the previous empirical studies all analyzed activist campaigns up to 2005 or 2006. It was possible to cross-check some of my data (for the first three years from 2010 to 2013) against a more recent paper by Bebchuk, Brav, Jiang, and Keusch on activist settlements, as this paper included data from 2000 to 2013.²²⁵

iii. Activist Hedge Fund Campaigns

The third step in the sample construction process was to manually filter out the campaigns where the activist investor was not an activist hedge fund. "There is no central database of activist hedge funds,"²²⁶ nor is there a universally agreed upon definition of a hedge fund.²²⁷ Rather, it has been noted that "the term 'hedge funds' is loosely defined."²²⁸ Therefore, identifying activist hedge fund campaigns always involves some element of

²²⁴ JCPenney, Perrigo Company, and Transocean.

²²⁵ See *infra* Part III.C.1. However, this article only contained details of settlements, and not, for example, unsuccessful proxy contests.

²²⁶ *Hedge Fund Activism*, *supra* note 83, at 1736.

²²⁷ FINANCIAL SERVICES AUTHORITY, HEDGE FUNDS AND THE FSA, DISCUSSION PAPER 16, 8 (2002), https://webarchive.nationalarchives.gov.uk/ukgwa/20130202110317mp_/http://www.fsa.gov.uk/pubs/discussion/dp16.pdf.

²²⁸ *Governance by Persuasion*, *supra* note 82, at 9.

judgment in determining whether an activist investor is appropriately classified as a hedge fund.²²⁹

Activist Insight also did not have a search function to search by a particular type of activist.²³⁰ Therefore, it was not possible to search for campaigns conducted only by activist hedge funds. Instead, I manually compiled a list of activists that had targeted each of the target companies. From the list of 504 target companies, 336 companies were easily identified as targets of activist hedge funds, as they involved campaigns by at least one major, well-known, activist hedge fund.²³¹ Next, 85 of the 504 companies were clearly identified not to be targets of activist hedge funds. Instead, these companies were targeted by public pension funds,²³² labor unions,²³³ individual “gadfly” investors,²³⁴ other shareholder organizations,²³⁵ family foundations,²³⁶ and religious organizations.²³⁷ The activists targeting the remaining 83 companies were more ambiguous as they were less well-known and so required further investigation and research to determine whether they would be appropriately classified as activist hedge funds. For these cases, I undertook a similar approach to that taken in previous literature by searching the internet for the websites of the funds to determine how they self-described and also by conducting general Google and Factiva searches for news articles describing the funds.²³⁸

²²⁹ See *Hedge Fund Activism*, *supra* note 83, at 1736–37 (noting that various steps were taken to decide whether activists should be classified as hedge funds including searching the internet for their websites and news articles describing them, and calling them to ask for their self-classification); Greenwood & Schor, *supra* note 83, at 364 (noting that the authors used company websites, newspaper articles, and the Center for International Securities and Derivatives Markets (“CISDM”) hedge fund database to determine whether or not the activist was a hedge fund or another type of investor).

²³⁰ It is possible to search for campaigns initiated by a particular activist hedge fund, e.g., Elliott Management, but it is not possible to search for all campaigns undertaken by activist hedge funds.

²³¹ These well-known activist hedge funds included Blue Harbour Group, Corvex Management, Elliott Management, Icahn Enterprises, JANA Partners, Marcato Capital Management, Pershing Square Capital Management, Relational Investors, Sachem Head Capital Management, Starboard Value, The Children’s Investment Fund Management (TCI), Taconic Capital Advisors, Third Point, Trian Fund Management, and ValueAct Capital.

²³² Such as the California Public Employees’ Retirement System (CalPERS), the California State Teachers’ Retirement System (CalSTRS), and the Office of the New York State Comptroller.

²³³ Such as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and United Steelworkers.

²³⁴ Such as John Chevedden, James McRitchie, Nick Rossi, Kenneth Steiner, William Steiner, Myra Young, and Jing Zhao.

²³⁵ Such as As You Sow, Majority Action, the Sierra Club, and SumOfUs.

²³⁶ Such as the Nathan Cummings Foundation.

²³⁷ Such as Mercy Investment Services, Sisters of St. Francis of Philadelphia, and Province of St. Joseph of the Capuchin Order, Inc.

²³⁸ A similar approach was taken in the Brav, Jiang, Partnoy & Thomas, Bratton, Clifford, and Klein & Zur studies. See *Hedge Fund Activism*, *supra* note 83, at 1737 (noting that the authors searched the internet for the websites of the filers and news articles describing them in order to classify them into hedge funds and nonhedged funds); Bratton, *supra* note 78, at 1386 (noting that some funds on the author’s list of hedge funds might object to the “hedge fund” denomination, for instance Relational

At the conclusion of this process, 55 of the 83 remaining target companies were identified as the targets of at least one activist hedge fund and thus were retained in the sample, which now comprised 391 target companies overall.²³⁹

iv. Dates of Campaigns

Activist campaigns were only included in the sample if the campaigns were initiated during the period from January 1, 2010 to December 31, 2019. Therefore, the fourth step in the process was to filter out any companies that were targeted either prior to 2010 or after 2019. Seven companies were identified as having been exclusively targeted before 2010, 32 companies were identified as exclusively targeted from 2020 onwards, and a further one company was targeted both before 2010 and after 2020 but not during 2010 to 2019.²⁴⁰ Removing these 40 campaigns that fell outside of the designated date range resulted in an updated list of 351 target companies.

Investors, which operated solely as a long-term equity investor and ran no short positions); Clifford, *supra* note 83, at 326 (noting that the author confirmed “that the activist in each filing [was] indeed a hedge fund through the fund’s webpage, other web searches, or published media reports”); Klein & Zur, *supra* note 83, at 195 (noting that several sources were used to verify the classification including the “funds’ Internet web sites, investor journals, Factiva, and newspaper and magazine articles to determine if the filer [was] recognized as being a hedge fund or other type of fund”).

²³⁹ Additional funds that were classified as activist hedge funds are as follows: Alken Asset Management, Altimeter Capital Management, Atlantic Investment Management, Barington Capital Group, BlueMountain Capital, Breeden Capital Management, Cadian Capital Management, D E Shaw Investment Management, Eminence Capital, Eton Park Capital Management, GAMCO Investors, HG Vora Capital Management, Hudson Executive Capital, Krupa Global Investors, Impactive Capital, Land and Buildings Investment Management, Paulson & Co., Perry Capital, PL Capital, P Schoenfeld Asset Management, Sandell Asset Management, SpringOwl Asset Management, Steel Partners, and Stonerise Capital Management. There is some divergence in the literature regarding how GAMCO Investors (formerly known as Gabelli Asset Management) should be classified and whether its campaigns should be included in a dataset of activist hedge fund events. Kahan and Rock describe GAMCO as an activist hedge fund. Kahan & Rock, *supra* note 11, at 1039. Klein and Zur include GAMCO in their non-hedge fund sample of “other entrepreneurial activists.” Klein & Zur, *supra* note 83, at 195. Greenwood & Schor note that GAMCO is an “investment management company that offers mutual funds to retail investors in addition to a number of investment advisory services and products to institutional and high-net worth individual investors,” including hedge fund investments. Greenwood & Schor, *supra* note 83, at 364 n.4. Greenwood & Schor chose not to classify all of GAMCO’s events as hedge fund events, as it is not clear whether the investment is being made either by and for its hedge fund, mutual fund, or other account. However, they include GAMCO events when the press release or 13D spells out activist demands. *Id.* at 364 n.3.

Funds that were not classified as activist hedge funds included Arjuna Capital (sustainable investor), Bluescape Energy Partners (private equity firm), Blum Capital (private equity firm), Cascade Investment (private holding company of Bill Gates), CtW Investment Group (labor activist group), Dana Investment Advisors (asset manager/investment advisor), Driehaus Capital Management (boutique investment advisor), Elevation Capital (private equity firm), Driehaus Capital Management (investment advisor), New Mountain Vantage Advisors (no outside investors), NorthStar Asset Management (sustainable wealth manager), Red Mountain Capital Partners (private equity firm), Sageview Capital (private equity firm), and Southeastern Asset Management (employee owned, no outside investors).

²⁴⁰ Note that these figures do not represent the total number of companies targeted pre-2010 and post-2019 because target companies were not removed from the sample if they were also targeted by a hedge fund from 2010–2019, in addition to being targeted either pre-2010 or post-2019.

v. Actively Pursued Campaigns

The fifth step was to filter out the instances where the activist hedge fund campaigns were not actively pursued in public, namely when an activist held shares in the target company but there was no record of any active campaign. These activist holdings were included in the original sample as the Activist Insight database uses quarterly 13F filings of hedge funds as a data source, in addition to any 13D filings. Such cases could include instances where activist hedge funds passively held shares and never made the switch to an activist intervention during the relevant date range, or cases where no activism was publicly reported or disclosed as it consisted purely of private interactions with management.

To identify which campaigns in the sample were not actively pursued, I used the campaign information that is held in the Activist Insight database and supplemented this data with extensive internet and Factiva searches to determine whether there was any news coverage of the campaigns or any public campaign statements made by any of the activists involved.

At the conclusion of this process, 172 of the 351 target companies were identified not to be the targets of active or public campaigns. This proportion of active versus dormant campaigns (dormant campaigns representing 49% of the sample, or 172/351 target companies) is very similar to the findings of Brav, Jiang, Partnoy, and Thomas, where 48.3% of their sample of activist events were instances where there was no record of public activism to achieve specific goals.²⁴¹ In 166 of the 172 cases that I identified, there was no 13D filing by the activist hedge fund. The activists also generally held quite small shareholdings in the company (typically less than 0.5%), and there was no record of any public statements or campaign strategy. In six cases, Schedule 13Ds had been filed, yet there was no record of any active campaign during the relevant date range. Overall, these cases seem to be examples of options to engage in activism, rather than private campaigns, although it is not possible to determine this definitively. After removing these 172 companies, 179 target companies remained in the sample as examples of active campaigns pursued by hedge funds.

vi. S&P 500 Index Reconstitution

As outlined in step one above, the date a company was added to or removed from the S&P 500 index was previously recorded. Activist campaigns were only included in the sample if they began while the company was a constituent of the S&P 500 index. Therefore, the sixth and final step in the data filtering process was to exclude any campaigns that took place either before or after a company was added to or removed from

²⁴¹ See *Hedge Fund Activism*, *supra* note 83, at 1741, 1742 tbl.1 (discussing that these campaigns were included in the total sample and events reported, even though it was not possible to conduct analysis on these campaigns due to their passive/private nature).

the S&P 500 index. Through this final filtering process, another fourteen target companies were removed from the sample.

vii. Final Sample

At the conclusion of the above six-step procedure, there was a final sample of 165 S&P 500 companies that had been actively targeted by at least one activist hedge fund during the ten-year sample period. The actual number of hedge fund-target company pairs was larger than this, at 215 event pairs, as various companies were targeted by multiple activist hedge funds. Several companies were also targeted more than once by the same hedge fund, bringing the total number of actual activist events to 228. This final sample size was smaller than the samples used by Brav, Jiang, Partnoy, and Thomas (548 active events), Clifford (788 events), Greenwood and Schor (784 events), and Boyson and Mooradian (418 events), but larger than the samples used by Klein and Zur (151 events), Bratton (130 activist-company pairs), and Briggs (52 target companies).²⁴²

B. *Data Analysis*

Following construction of the sample, data was gathered to test the hypotheses and answer the research questions set out in Part II. Despite the fact that hedge funds fall outside of much regulation, there are two U.S. securities laws that require hedge funds to publicly disclose the holdings in their portfolios.

First, Section 13(d) of the Securities Exchange Act of 1934 requires that any investor, including a hedge fund, file a Schedule 13D with the U.S. Securities and Exchange Commission (“SEC”) within ten days of acquiring more than five percent of any class of securities of a publicly traded company if the investor has an interest in influencing the management of the company.²⁴³

Second, Section 13(f) of the Securities Exchange Act of 1934 provides that institutional investors managing more than \$100 million must file a Form 13F each quarter detailing the number of shares the investor holds in exchange-traded companies.²⁴⁴ Therefore, hedge funds with significant assets under management must make quarterly Form 13F filings to report their holdings.

As noted earlier, this study went beyond many of the previous studies as it included campaigns where no Schedule 13D was filed. Form 13F filings

²⁴² *Hedge Fund Activism*, *supra* note 83, at 1741,1742 tbl.1; Clifford, *supra* note 83, at 326; Greenwood & Schor, *supra* note 83, at 364; Boyson & Mooradian, *supra* note 154, at 170; Klein & Zur, *supra* note 83, at 187; Bratton, *supra* note 78, at 1385–86 (focusing on “hedge fund activists and other investment institutions that act like them” rather than limiting their study to activist hedge funds); Briggs, *supra* note 205, at 696.

²⁴³ Securities Exchange Act of 1934 § 13(d) (codified at 15 U.S.C. § 78m (2018)).

²⁴⁴ Securities Exchange Act of 1934 § 13(f) (codified at 15 U.S.C. § 78m (2018)).

were particularly useful for this purpose, as Schedule 13D filings were not made for many of the activist campaigns in the sample. One of the major reasons for the lack of Schedule 13D filings is that a significant amount of capital is required to acquire a five percent stake in a large-cap S&P 500 company. In many of the sample events at the target companies, a Schedule 13D was not filed as hedge funds engaged in activism with less than a five percent stake. Overall, of the 228 activist events, there was a Schedule 13D filed in 99 activist campaigns (43.4% of the sample) and no Schedule 13D filed in 129 activist campaigns (56.6% of the sample).

This approach had the advantage of being more inclusive to capture more activist campaigns, and in particular to provide crucial data on the most recent campaigns and the evolution of hedge fund activism at S&P 500 companies. However, due to the variation in the information available in the different types of filings (Schedule 13Ds versus Form 13F filings), there was some imbalance in the dataset regarding the precision of information recorded for 13D and 13F events. This is mostly relevant to the investment horizon variable and is discussed further in that section below.

1. *Prevalence of Activist Board Representation*

i. Methodology

The next crucial stage of the process was to classify campaigns according to whether board representation was sought. Campaigns were classified as activist board representation campaigns where at least one of the strategies pursued by the activist hedge fund was to seek board representation. This included cases where the activist attempted to replace a subset of directors and cases where the activist aimed to take control of the board. The campaigns classified as non-board level included all other activist events where board representation was not one of the publicly stated goals.

Data on the specific campaign strategies pursued by the activist hedge funds were gathered from a number of different sources including filings with the SEC (using the EDGAR filing database); the Activist Insight database; news reports gathered from Factiva searches; the activists' own websites and activist campaign websites; and general internet searches.

ii. Results

In total, there were 126 activist board representation campaigns at 101 unique companies and 102 non-board level campaigns at 85 unique companies. There was some overlap in the companies targeted: of the non-board level campaigns, 26 campaigns (at 21 unique companies) took place at companies that were also the target of board representation by other activist hedge funds (either at the same time or at a different time).

As noted above, activist campaigns initiated up to the end of 2019 were included in the sample. Whether an activist board representation campaign fell within the sample period was determined using the date the 13D was

filed or the media announcement date, as opposed to the date when board representation was sought or gained. Therefore, a couple of cases were included when 13Ds were filed before the end of 2019, but the board seats were not secured until 2020.²⁴⁵

Table 2 summarizes the total number of activist board representation campaigns and non-board level campaigns for each year of the study.

Table 2 – Activist Board Representation and Non-Board Level Campaigns at S&P 500 Companies (2010–2019)

This table shows the distribution of all activist board representation campaigns and non-board level campaigns that were launched at S&P 500 companies between calendar years 2010 and 2019. The relevant date used for the board representation campaigns is the date the board campaign was announced. The relevant date used for the non-board level campaigns is the date of the 13D or the media announcement.

Year	Activist Board Representation Campaigns	Percentage of Total Campaigns	Non-Board Level Campaigns	Percentage of Total Campaigns	Total Campaigns
2010	5	56%	4	44%	9
2011	8	73%	3	27%	11
2012	11	48%	12	52%	23
2013	11	41%	16	59%	27
2014	13	46%	15	54%	28
2015	23	58%	17	42%	40
2016	14	70%	6	30%	20
2017	16	70%	7	30%	23
2018	11	48%	12	52%	23
2019	12	55%	10	45%	22
2020	2				2
Total	126	55%	102	45%	228

To revisit the research questions and hypotheses presented in Part II, Research Question 1 asked whether activist board representation is becoming a more common form of hedge fund activism at S&P 500 companies and Hypothesis 1 was that activist board representation campaigns are increasingly prevalent at S&P 500 companies.

The below charts outline the number of activist board representation campaigns by year, the number of non-board level campaigns by year, and the percentage of each type of campaign per year.

²⁴⁵ These cases were LKQ Corporation, where a 13D was filed on September 12, 2019, and board representation was granted on August 14, 2020, and Nielsen Holdings NV, where a 13D was filed on August 13, 2018, and board representation was granted on April 30, 2020.

Chart 1 – Number of Activist Board Representation Campaigns at S&P 500 Companies (2010 to 2019)

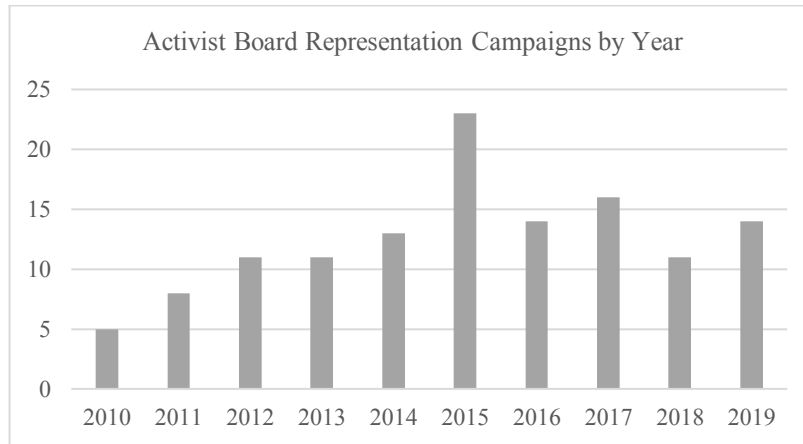


Chart 1 shows that in terms of the number of activist board representation campaigns, there is a steady increase from 2010 until 2015 when activist board representation campaigns peaked, followed by some slight decreases from 2016 to 2019 (although the number of campaigns still remained above 2010 to 2013 levels).

Chart 2 – Number of Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)

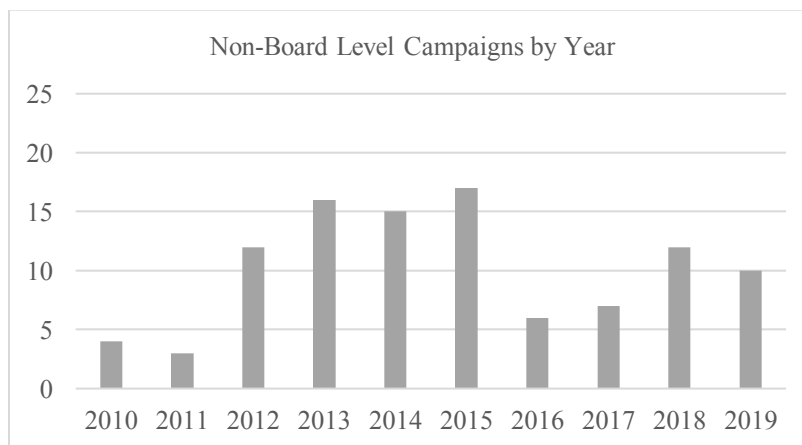
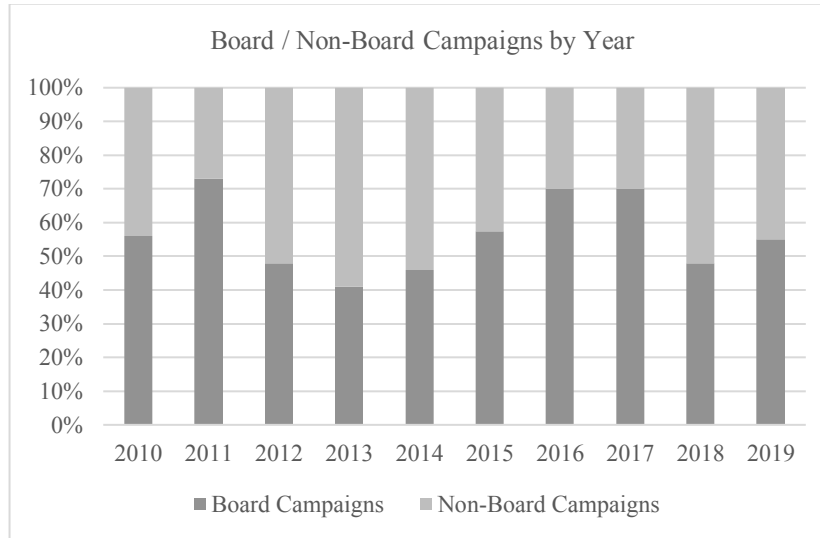


Chart 2 illustrates that the number of non-board level campaigns also decreased after 2015, so activist hedge fund campaigns peaked generally in 2015, before decreasing somewhat from 2016 to 2019.

Chart 3 – Percentage of Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



In terms of the percentage of total campaigns, Chart 3 shows that activist board representation campaigns were more common than non-board level campaigns from 2015 to 2017, before being more evenly split with non-board level campaigns in 2018 and 2019.

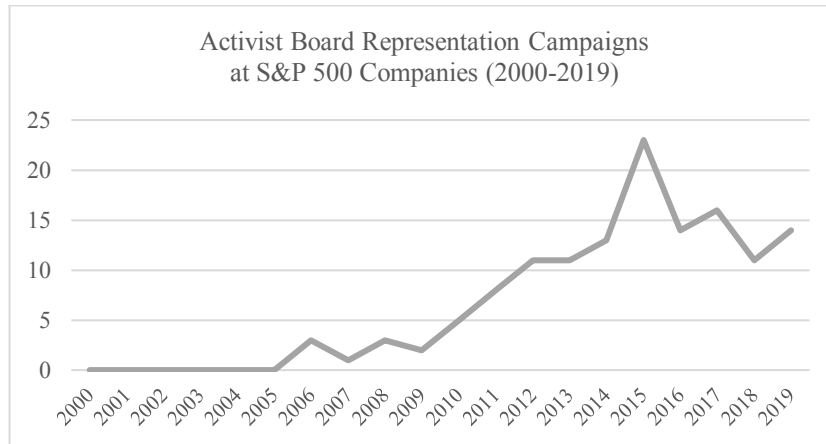
Overall, 55% of campaigns in the sample involved the activist hedge fund seeking board representation. In the first half of the decade (2010 to 2014), 49% of campaigns at S&P 500 companies involved requests for activist board representation, and in the second half of the decade (2015 to 2019), 60% of activist campaigns at S&P 500 companies sought board representation.

I did not systematically analyze data prior to 2010, as my sample focused specifically on campaigns from 2010 to 2019. However, Section II.B.1 above discussed the prevalence of activist board representation at S&P 500 companies prior to 2010. It was noted there—by combining results of two prior empirical studies—that there were only eight identified cases of activist board representation at S&P 500 companies from 2000 to 2009. There were some pre-2010 cases that I filtered out of my dataset during the steps identified in Section A.2.(d) above. When I filtered out these pre-2010 campaigns, the cases I identified were consistent with those reported in the Bratton and Bebchuk studies, with the addition of one further target company/hedge fund pair that I identified.²⁴⁶ Therefore, it is estimated that there were only around nine campaigns for activist board representation at

²⁴⁶ This was Pershing Square's unsuccessful proxy contest at Target Corporation in 2009.

S&P 500 companies between 2000 and 2009.²⁴⁷ This can be compared to 126 campaigns from 2010 to 2019. This is depicted in the chart below, to demonstrate the growth of activist board representation campaigns at S&P 500 companies in the past 20 years since 2000.

Chart 4 – Activist Board Representation Campaigns at S&P 500 Companies (2000 to 2010)



Research Question 2, which was presented in Part II, concerned whether activist board representation is becoming a more successful form of hedge fund activism. Hypothesis 2 was that activist board representation campaigns are increasingly successful. Part II presented some evidence of the success of activist board representation campaigns in earlier years, although this was not systematically investigated in any of the studies. The prior studies also concerned a broader range of companies than the S&P 500. Conceptually, it may be easier for activist hedge funds to succeed at smaller companies compared to some of the largest and most powerful companies in the United States.

However, my study revealed very high success rates for activist board representation campaigns at S&P 500 companies from 2010 to 2019 (success being defined in terms of the activist hedge fund securing at least one board seat). Indeed, the campaigns were almost always at least partially successful. In only 16 out of the 126 activist board representation campaigns studied (13%) did the hedge fund fail to secure any board representation at all. In 110 activist board representation campaigns, the activists secured at least one board seat, which is an overall success rate of 87%. Therefore, it

²⁴⁷ This may not fully capture all of the activist board representation campaigns at S&P 500 companies between 2000 and 2009, since I did not specifically collect this data in a rigorous manner. However, it is believed to be a reasonable estimate relying on the findings of the prior studies referred to.

seems that not only is activist board representation a more prevalent strategy at S&P 500 companies, it is also a very successful strategy.

iii. Board Campaigns by Hedge Fund

The reported success rates of these campaigns may also be a feature of the specific types of activist hedge funds that target S&P 500 companies. The data revealed that a limited number of activist hedge funds initiate activist board representation campaigns, whereas a wider group of activist hedge funds are involved in non-board level campaigns. Table 3 below details the number of activist board representation campaigns and non-board level campaigns by activist hedge fund.

Table 3 – Activist Board Representation and Non-Board Level Campaigns at S&P 500 Companies by Activist Hedge Fund

This table shows the number of activist board representation campaigns and non-board level campaigns that were launched at S&P 500 companies between calendar years 2010 and 2019 by hedge fund. The hedge funds are ranked in order of the largest number of activist board representation campaigns that they initiated.

Activist Hedge Fund	Number of Board Representation Campaigns	Percentage of Total Board Campaigns	Number of Non-Board Level Campaigns	Percentage of Total Non-Board Level Campaigns
Icahn Enterprises	23	18.3%	6	5.9%
Elliott Management	21	16.7%	5	4.9%
Trian Fund Management	11	8.7%	2	2.0%
ValueAct Capital Partners	11	8.7%	5	4.9%
Starboard Value	10	7.9%	5	4.9%
JANA Partners	9	7.1%	11	11.0%
Pershing Square Capital Management	6	4.8%	5	4.9%
Corvex Management	5	4.0%	6	5.9%
Third Point Partners	4	3.2%	10	9.8%

Relational Investors	4	3.2%	6	5.9%
Land & Buildings	3	2.4%		
D E Shaw Investment Management	3	2.4%		
Sachem Head Capital Management	2	1.6%	2	2.0%
Other	14	11.1%	39	38.2%
Total	126		102	

Table 3 illustrates that only thirteen activist hedge funds initiated more than one board representation campaign at an S&P 500 company in the ten years from 2010 to 2019 and six activist hedge funds (Icahn Enterprises, Elliott Management, Trian Fund Management, ValueAct Capital Partners, Starboard Value, and JANA Partners) were responsible for more than two-thirds (67.4%) of all activist board representation campaigns at S&P 500 companies. Therefore, a very small group of formidable activist hedge funds are responsible for the majority of activist board representation campaigns at S&P 500 companies.

It is clear from this table that board representation has become the strategy of choice for a handful of activist hedge funds. Funds such as Icahn Enterprises, Elliott Management, Trian Fund Management, ValueAct Capital Partners, and Starboard Value in particular initiate many more activist board representation campaigns at S&P 500 companies than they do non-board level campaigns. Funds such as JANA Partners, Pershing Square Capital Management, and Corvex Management appear to take a more mixed approach to their campaign strategies as their campaigns are more evenly distributed between activist board representation and non-board level campaigns.

The activist hedge funds listed in Table 3 are also the largest activist hedge funds in the United States.²⁴⁸ The evolution in the tactics used by these major activist hedge funds has largely driven the growth of activist board representation in S&P 500 companies since 2009.

²⁴⁸ The largest activist hedge funds in the United States (by assets under management in 2022) are: D.E. Shaw Investment Management (\$60 billion); Elliott Management (\$56 billion); Icahn Enterprises (\$21 billion); Pershing Square Capital Management (\$19 billion); Third Point Partners (\$16 billion); ValueAct Capital (\$16 billion); Trian Fund Management (\$8 billion); Sachem Head Capital Management (\$6 billion); Starboard Value (\$5 billion); Corvex Management (\$3 billion); and Jana Partners (\$2 billion).

2. *Investment Horizon*

i. *Methodology*

The investment duration of each activist hedge fund investment was estimated using multiple sources. The goal was to estimate as precisely as possible the date the activist hedge fund purchased shares in the target company and the date the activist hedge fund exited the target company. I identified the date the hedge fund purchased shares in each target company using four principal types of sources. If the activist holding was announced simultaneously with the filing of a Schedule 13D, the date of the Schedule 13D filing was used. Similarly, if the activist or the company made a media announcement regarding the activist holding, the specific date of purchase listed in the announcement was used. Extensive news searches were conducted in Factiva (using the activist hedge fund and target company names as keywords) and Google to gather this information. Additionally, if a proxy statement was filed, the specific date the activist bought shares in the company was extracted from the Schedule 13A form.

Brav, Jiang, and Li recently noted that “a large majority of the hedge fund activism events begin, and are announced by, the filing of Schedule 13D with the U.S. Securities and Exchange Commission” and that “Schedule 13D filings have been the primary information source for virtually all empirical studies of hedge fund activism in the U.S.”²⁴⁹ However, in my sample, there was a higher proportion of activist events that *did not* feature a Schedule 13D compared to events that did. Of the 228 activist events, there was a Schedule 13D filed in 99 events, and no Schedule 13D filed in the remaining 129 events. The distribution of 13Ds compared to 13Fs was also not uniform between activist board representation and non-board level campaigns. In the sample, 74 out of the 126 activist board representation events (58.7%) involved a Schedule 13D filing, with the remaining 52 events relying upon information in 13F filings (41.3%). For the non-board level campaigns, only 25 events involved Schedule 13D filings (25%), with 77 events being based upon 13F data (75%).

For the campaigns where activist board representation was sought, a precise date when the activist hedge fund purchased shares in the target company could be identified (using one of the sources described above) for 73 out of 126 events (57.9%).²⁵⁰

For the remaining 53 events involving requests for activist board representation (42.1%), the best information available to estimate when the activist purchased the shares was quarterly 13F filings. Form 13F filings must be filed each quarter. Therefore, this information enabled me to identify in which specific quarter the activist bought the shares, although it

²⁴⁹ *Governance by Persuasion*, *supra* note 82, at 12–13.

²⁵⁰ There were 13Ds in 74 out of 126 events (58.7%), but the 13D filing was not always done at the same time as the activist purchasing shares in the target company.

was not possible to pinpoint the exact day of purchase. In these cases, the mid-point in the quarter was used as the date of purchase, as this represented the best estimate with the lowest overall error rate. To illustrate, if an activist hedge fund disclosed the holding on its September 30, 2018, 13F filing, but not on its June 30, 2018, filing, the mid-point of August 15, 2018 was used as an estimated date of purchase. This date could be incorrect by up to forty-five days. However, this was the best information available from SEC filings for these events. For the non-board level campaigns, the same process was used. Here, a specific purchase date was identifiable in 43% of cases (44 out of 102 events), with the remaining 57% (58 out of 102 events) relying on 13F information.

To ascertain the date the activist hedge fund exited the investment, a similar process was followed. Given that using the mid-point ascertainable from 13F data could result in the purchase date being incorrect by up to forty-five days and also the exit date being incorrect by up to forty-five days, some data on investment duration could theoretically be incorrect by up to ninety days (three months). However, this was the best information available for my study and for any previous empirical studies that report the investment duration of activist hedge fund campaigns. The same approach was used with regard to the activist board representation cases and the non-board level cases to ensure consistency.

In the study by Brav, Jiang, Partnoy, and Thomas, the authors used multiple sources to determine the “exit date,” including 13F data for the first quarter-end when the hedge fund’s holding in the target company drops below one percent or one million dollars. These dates have the same error rates as was an issue for my study, and the authors acknowledge that the sources only allow them to form “estimates of the hedge fund’s investment duration.”²⁵¹

ii. Results

Research Question 3 asked whether activist board representation is associated with a longer-term investment approach on the part of the activist hedge fund. The hypothesis was that activist hedge funds that successfully secure board seats are likely to stay invested in target companies longer than activists without board seats.

The results of my study show that the average investment period of exited investments for campaigns where activists secured seats on the board is three years and one month (3.06 years). The median is two years and eleven months (2.87 years). However, this investment duration underestimates the average investment period of cases of activist board representation. Given the recent nature of the dataset, many of the investments where activists secured board representation have not been

²⁵¹ *Hedge Fund Activism*, *supra* note 83, at 1748–49.

exited (twenty-two out of 102 successful events, or twenty-two percent). Assuming an exit date of June 30, 2022, as a cutoff for the study, the average investment duration of investments that have not been exited would be five years and nine months (5.71 years) and the median would also be five years and nine months (5.71 years). If all those investments had in fact been exited on June 30, 2022, the overall average duration of activist board representation campaigns would increase to three years and eight months (3.63 years) overall. The median would increase to three years and four months (3.30 years). These figures clearly underestimate the overall investment duration for the dataset of activist board representation campaigns, as twenty-two percent of campaigns are still ongoing, which will bring the overall average further upward. The complete picture of the overall average investment duration of the activist board representation campaigns in this sample will not be available for some years into the future but will clearly exceed three years and eight months.

It should be noted that the above investment durations are for *successful* activist board representation campaigns. If the unsuccessful campaigns are also included, the average duration is slightly lower, at two years and ten months (2.86 years) for exited campaigns (with a median of two years and nine months (2.75 years)) or an average of three years and five months (3.41 years) if ongoing campaigns (twenty-two out of 114 events, or nineteen percent) are included (with a median of three years two months (3.15 years)). The difference between these two sets of averages can largely be explained by activist hedge funds exiting the investment after they failed to secure board representation or deciding to withdraw their campaign, as well as other intervening events such as the company being acquired.

By way of comparison, the average investment period of exited investments for non-board level campaigns is much shorter, at nineteen months (1.61 years). The median is fifteen months (1.25 years). Notably, these figures are more consistent with the findings in the Brav, Jiang, Partnoy, and Thomas study regarding holding periods, where it was highlighted that “[t]he median holding period for completed deals is about 1 year” and that an estimate for all events (including those not exited yet) is “closer to 20 months.”²⁵²

These investment periods present a more accurate representation of the overall picture for non-board level activism as there are much fewer non-board level campaigns that have not been exited as of June 30, 2022 (six of ninety-six events, or seven percent) compared to the activist board representation events. If these ongoing events are included in the overall average investment duration, the average would only increase slightly to twenty-one months (1.79 years) (with a median of fifteen months (1.27 years)).

²⁵² *Hedge Fund Activism*, *supra* note 83, at 1731–32.

Table 4 – Investment Periods for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010–2019)

This table shows the average and median investment periods for activist board representation and non-board level campaigns at S&P 500 companies, differentiating further between exited and current campaigns as well as successful board representation and all board representation campaigns. T-statistics and significance levels are reported for all comparisons of mean.

	Investment Period of Exited Campaigns	Investment Period of Current Campaigns (at 30 June 2022)	Overall Investment Period (at 30 June 2022)			
Average Investment Periods (Standard Deviations)						
Successful Board Representation Campaigns	3.06 (1.55)	5.71 (2.18)	3.63 (2.02)			
All Board Representation Campaigns	2.86 (1.57)	5.71 (2.13)	3.41 (2.05)			
All Non-Board Level Campaigns	1.61 (1.38)	4.54 (1.35)	1.79 (1.55)			
Median Investment Periods						
Successful Board Representation Campaigns	2.87	5.72	3.30			
All Board Representation Campaigns	2.75	5.72	3.15			
All Non-Board Level Campaigns	1.25	4.22	1.27			
T-statistics for Comparison of Average Investment Periods						
		Mean	S.D.	<i>n</i>	<i>t</i>	<i>df</i>
Investment Period of Exited Campaigns	Successful Board vs. All Non-Board	3.06	1.55	80	6.42***	160
	All Board vs. All Non-Board	2.86	1.57	92	5.69***	178
		1.61	1.38	90		

Investment Period of Ongoing Campaigns	Successful Board vs. All Non-Board	5.71 4.54	2.18 1.35	22 6	1.62	13
	All Board vs. All Non-Board	5.71 4.54	2.18 1.35	22 6	1.62	13
Overall Investment Period (Combined)	Successful Board vs. All Non-Board	3.63 1.79	2.02 1.55	102 96	4.51***	21 7
	All Board vs. All Non-Board	3.41 1.79	2.05 1.55	114 96	5.24***	22 0
S.D.: standard deviation, <i>n</i> : sample size, <i>t</i> : T-statistic, <i>df</i> : degrees of freedom, *, **, ***: statistically significant at $p < .05$, $p < .01$, and $p < .001$, respectively (one-tailed); means of significant differences are highlighted in bold font.						

Regardless of the method of computation, it is estimated that, on average, the investment duration of activist board representation campaigns is between 78% and 103% longer than the duration of non-board level campaigns.

Comparison of means using a one-tailed heteroscedastic *t*-test showed that the average investment duration of activist board representation campaigns is significantly longer than the average investment duration of non-board level campaigns, both looking at the investment period of only exited campaigns and the investment period of all (exited and ongoing) campaigns combined. The results were consistent irrespective of whether I compare only successful activist board representation campaigns and all non-board level campaigns ($t(160) = 6.42$, $p < .001$, and $t(217) = 4.51$, $p < .001$, respectively) or all activist board representation campaigns and all non-board level campaigns ($t(178) = 5.69$, $p < .001$, and $t(220) = 5.24$, $p < .001$). The same significance levels were obtained when relaxing to a two-tailed *t*-test.

Previous studies have used the median investment duration of activist campaigns, rather than the average.²⁵³ If using the median investment duration, the median board representation campaign is between 120% and 160% longer than the median non-board level campaign.

Charts 5 and 6 below depict the average and median investment periods for activist board representation campaigns and non-board level campaigns detailed above.

²⁵³ See, e.g., *Hedge Fund Activism*, *supra* note 83, at 1731–32 (noting that the median holding period for analyzed deals was approximately one year).

Chart 5 – Average Investment Period for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)

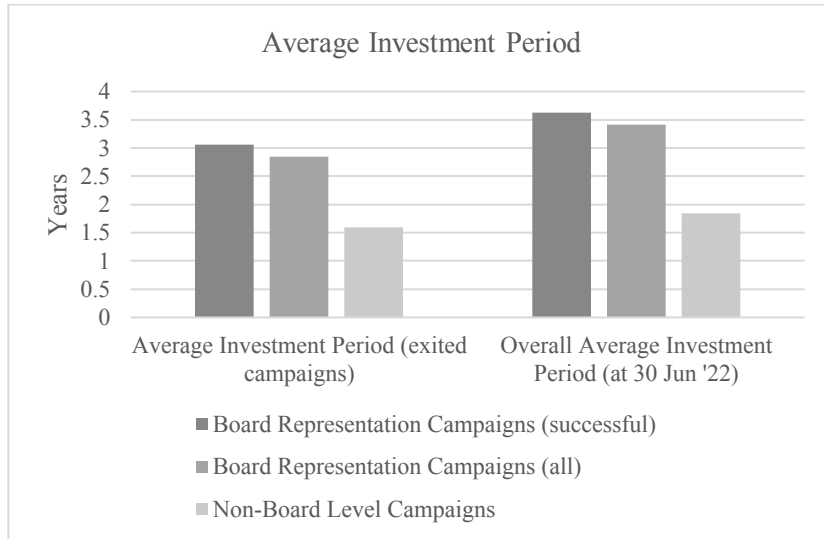


Chart 6 – Median Investment Period for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)

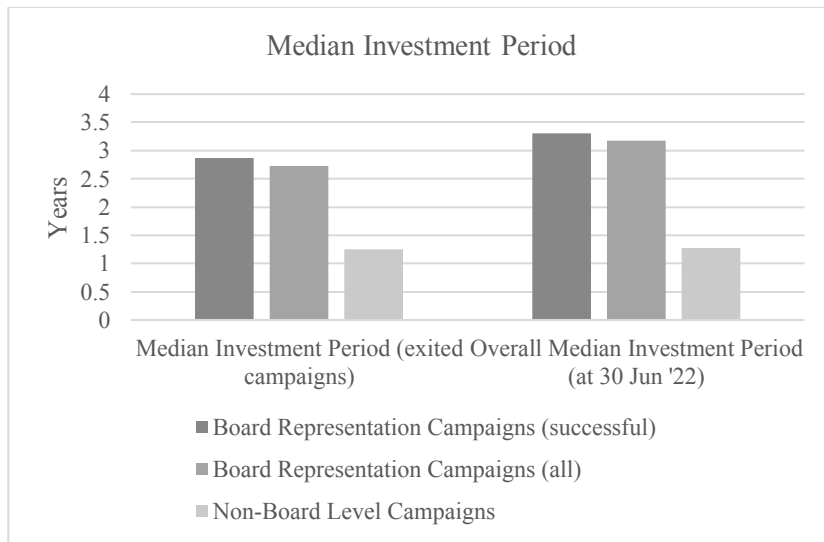
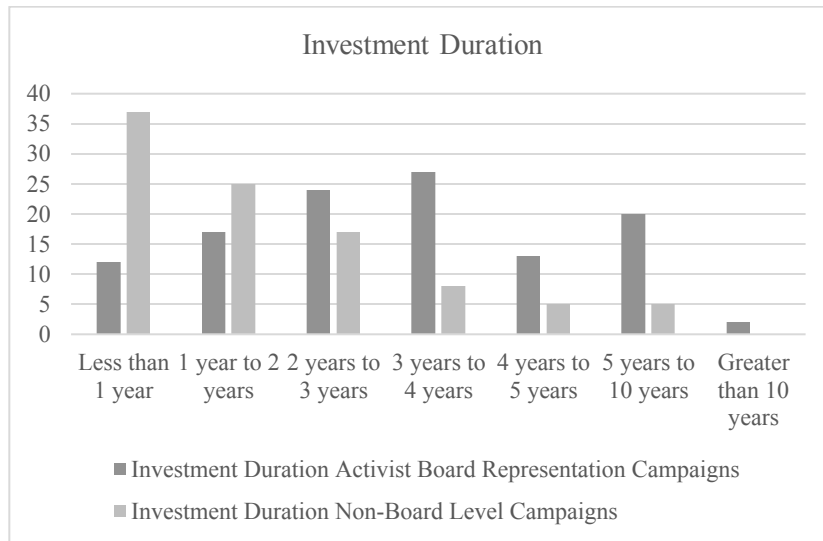


Chart 7 below shows the distribution of investment periods for activist board representation campaigns and non-board level campaigns. Here, we can see that the most common investment period for non-board level

campaigns is less than one year, and the most common investment period for activist board representation campaigns is between three and four years.

Chart 7 – Distribution of Investment Periods for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



iii. Longest Campaigns

While three years and eight months is the average duration of successful activist board representation campaigns (assuming exits on June 30, 2022), there are numerous campaigns with investment periods significantly exceeding this average. In twenty-two campaigns at twenty companies (19% of the activist board representation events or 20% of the companies targeted), the hedge fund was (or has been) invested in the target company for a period of more than five years. Such investment periods represent a considerable deviation from the traditional description of activist hedge fund behavior. This can be seen from Chart 7 above, and the longest board representation campaigns in the sample are also outlined in Table 5 below.

Table 5 – Activist Board Representation Campaigns with Investment Periods Exceeding 5 years

Activist board representation campaigns initiated at S&P 500 companies between 2010 and 2019 where the activist hedge fund has been invested for a period of more than five years (data on exits collected up to June 30, 2022).

	Company	Year Board Seats Sought	Activist Hedge Fund	Investment Period (years) (at Jun. 30, 2022)	Ongoing or Exited (at Jun. 30, 2022)
1.	CBRE Group, Inc.	2012	ValueAct Capital Partners	10.52	Ongoing
2.	Mondelez International, Inc. (formerly Kraft Foods)	2014	Triam Fund Management	10.13	Ongoing
3.	Wells Fargo & Company	2016	GAMCO Investors	8.38	Ongoing
4.	General Electric Company	2017	Triam Fund Management	7.13	Ongoing
5.	Sysco Corporation	2015	Triam Fund Management	7.13	Ongoing
6.	Citrix Systems, Inc.	2015	Elliott Management	7.06	Ongoing
7.	Conagra Brands, Inc.	2015/2019	JANA Partners	7.04	Ongoing
8.	Hess Corporation	2013	Elliott Management	6.88	Exited
9.	United Airlines Holdings, Inc.	2016	Altimeter Capital Management PAR Capital Management (joint)	6.43	Ongoing
10.	MGM Resorts International	2015	Land & Buildings	6.42	Exited
11.	Bank of New York Mellon Corporation	2014	Triam Fund Management	6.38	Exited

12.	The Williams Companies Inc	2013/2016	Soroban Capital Partners	6.26	Exited
13.	Arconic (now Howmet Aerospace Inc.)	2016/2017	Elliott Management	6.23	Exited
14.	Chesapeake Energy Corporation	2012	Icahn Enterprises	6.17	Exited
15.	Seagate Technology Holdings PLC	2018	ValueAct Capital Partners	6.13	Ongoing
16.	Chipotle Mexican Grill, Inc.	2016	Pershing Square Capital Management	5.82	Ongoing
17.	The Procter & Gamble Company	2017	Trian Fund Management	5.62	Ongoing
18.	The Dow Chemical Company	2014	Third Point Partners	5.57	Exited
19.	Advance Auto Parts, Inc.	2015	Starboard Value	5.39	Exited
20.	Baxter International Inc.	2015	Third Point Partners	5.13	Exited
21.	Microsoft Corporation	2013	ValueAct Capital Partners	5.01	Exited

It is clear from this table that some activist hedge funds tend to focus on longer-term investments more than others, even within the activist board representation subsample. Most prominently, Trian Fund Management has been invested for more than five years in five out of ten (fifty percent) of its activist board representation corporate targets. Trian clearly does not embody the typical critique of activist hedge funds as short-term investors, as the average tenure of its investments where the fund secured activist board representation from 2010 to 2019 is five years and seven months (and rising, as four of the campaigns are ongoing).

Table 6 below outlines the duration of Trian's investments when it secured board representation.

Table 6 – Trian Fund Management Activist Campaigns

Activist board representation campaigns initiated at S&P 500 companies between 2010 and 2019 by Trian Fund Management (data on exits collected up to June 30, 2022).

	Company	Year Board Seats Sought	Activist Directors Appointed	Investment Period (years) (at Jun. 30, 2022)	Current Shareholder or Exited (at Jun. 30, 2022)
1.	Mondelez International, Inc. (formerly Kraft Foods)	2014	1 affiliated	10.13	Current
2.	General Electric Company	2017	1 affiliated	7.13	Current
3.	Sysco Corporation	2015	2 affiliated	7.13	Current
4.	Bank of New York Mellon Corporation	2014	1 affiliated	6.38	Exited (sold shares)
5.	The Procter & Gamble Company	2017	1 affiliated	5.62	Current
6.	Family Dollar Stores, Inc.	2011	1 affiliated	4.94	Exited (acquired by Dollar Tree, Inc.)
7.	DuPont (E.I. du Pont de Nemours and Company)	2015	0 (unsuccessful proxy contest)	4.30	Exited (merged with Dow Chemicals)
8.	Pentair plc (2 campaigns)	2018	1 affiliated	3.63	Exited (sold shares)
9.	Trane Technologies (formerly Ingersoll Rand)	2012	1 affiliated	3.52	Exited (sold shares)
10.	PepsiCo, Inc.	2015	1 affiliated	3.25	Exited (sold shares)

It is also worth noting here that Trian Fund Management is also atypical of the activist hedge funds in the dataset as it exclusively put affiliated directors on the boards of target companies. In each case of a successful board representation campaign, the director appointed was a representative of Trian.²⁵⁴

iv. Shortest Campaigns

On the other hand, there are some activist board representation campaigns with significantly shorter than average investment periods. Twelve activist campaigns (10% of the activist board representation events or 12% of the companies targeted) had an investment period of less than one year. The shortest campaigns in the sample are outlined in Table 7 below:

Table 7 – Activist Board Representation Campaigns with Investment Periods Less than 1 year

Activist board representation campaigns initiated between 2010 and 2019 where the activist hedge fund was invested for less than one year (data on exits collected up to June 30, 2022).

	Company	Year Board Seats Sought	Activist Hedge Fund	Investment Period (years) (at Jun. 30, 2022)	Ongoing or Exited (at Jun. 30, 2022)
1.	Electronic Arts Inc.	2011	Relational Investors	0.50	Exited
2.	Allergan, Inc.*	2014	Pershing Square Capital Management	0.58	Exited (acquired)
3.	Dell Inc.*	2013	Icahn Enterprises	0.65	Exited (acquired)
4.	Bristol-Myers	2017	JANA	0.75	Exited

²⁵⁴ At Mondelez, Nelson Peltz (Trian's CEO and a Founding Partner) sat on the board from 2014 to 2018, then was replaced by Peter May (Trian's President and a Founding Partner) from 2018 to 2022; at General Electric, Edward Garden (Trian's CIO and a Founding Partner) has sat on the board since 2017; at Sysco, Nelson Peltz sat on the board from 2018 to 2021, then was replaced by Joshua Frank (Co-Head of Research and a Trian Partner) in 2021; at BNY Mellon, Edward Garden sat on the board from 2014 to 2019; at P&G, Nelson Peltz sat on the board from 2017 to 2021; at Family Dollar, Edward Garden sat on the board from 2011 to 2015; at Pentair, Matthew Peltz (a Trian Partner) sat on the board in 2018; at Trane Technologies, Nelson Peltz sat on the board from 2012 to 2014; and at PepsiCo, Nelson Peltz sat on the board from 2015 to 2016.

	Squibb Company		Partners		
5.	Dollar Tree, Inc.*	2019	Starboard Value	0.75	Exited (withdrew)
6.	Harris Corporation	2016	JANA Partners	0.76	Exited
7.	Family Dollar Stores, Inc.*	2015	Elliott Management	0.76	Exited (acquired)
8.	Newell Brands Inc.	2018	Starboard Value	0.77	Exited
9.	The Clorox Company*	2011	Icahn Enterprises	0.84	Exited (withdrew)
10.	PetSmart Inc.*	2014	JANA Partners	0.82	Exited (acquired)
11.	Sempra Energy	2018	Elliott Management	0.93	Exited
12.	Genzyme Corporation	2010	Icahn Enterprises	0.98	Exited (acquired)

Six of these twelve events were unsuccessful activist board representation campaigns (indicated with *). As the above table shows, in these six instances, the campaigns were exited either when the activist hedge fund withdrew its campaign (two campaigns) or when the target company was acquired (either by another listed company or by a private equity fund) (four campaigns).²⁵⁵ There is one additional campaign (Genzyme Corporation) where the activist was successful in the board representation campaign, but the company was shortly thereafter acquired.²⁵⁶

However, there are five campaigns²⁵⁷ where the activist secured board seats by way of settlement with the target company and nevertheless still exited the investment within a year. This was atypical in the dataset. These campaigns generally involved the activists' campaign strategies not going to plan, or they involved the activist hedge fund teaming up with a private equity partner whose representatives were on the board and who remained invested in the company for a longer period.²⁵⁸

²⁵⁵ Dell was taken private by founder and CEO Michael Dell and private equity firm Silver Lake Partners in 2013; Family Dollar Stores, Inc. was acquired by Dollar Tree, Inc. in 2014; Allergan was acquired by Actavis in 2015; and PetSmart was bought by a private equity consortium led by BC Partners Ltd. in 2015.

²⁵⁶ Genzyme was acquired by Sanofi in 2011.

²⁵⁷ Relational Investors' campaign at Electronic Arts, JANA Partners campaign at Bristol-Myers Squibb, JANA Partners campaign at Harris Company, Starboard Value's campaign at Newell Brands, and Elliott Management's campaign at Sempra Energy.

²⁵⁸ For example, in Elliott Management's campaign at Sempra Energy, Elliott had joined forces with the private equity firm Bluescape Energy Partners to appoint directors to the board and persuade the company to conduct a strategic review of its business. The directors appointed to the board were affiliated

3. Capital Commitment

i. Methodology

I also measure and report the size of the activists' maximum stakes in the target companies, as a percentage of outstanding shares of the target company. This information comes from the Schedule 13D filing or the subsequent amendments to the 13D filings (Schedule 13D/A forms). For the non-Schedule 13D events, the information is collected from press releases, other news, or Form 13Fs. I record the highest percentage holdings by the filing party in the target company.

ii. Results

The average size of an investment for successful activist board representation campaigns is 6.35% of the shares or a median of 6.37%. If unsuccessful campaigns are included, this reduces to an average of 6.12% or a median of 6.00%. By way of comparison, the average size of investment for non-board level campaigns is 3.65% of the shares or a median of 2.80%. This also reduces to an average of 3.52% or a median of 2.67% if the overlap cases—companies that were also targeted for board representation—are removed.

Table 8 – Average Relative Size of Stake for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010–2019)

The table shows the average relative size of stake for activist board representation and non-board level campaigns at S&P 500 companies, differentiating further between successful board representation and all board representation campaigns. T-statistics and significance levels are reported for the comparisons of mean.

T-statistics for Comparison of Average Relative Size of Stake					
	Mean / %	S.D. / %	<i>n</i>	<i>t</i>	<i>df</i>
Successful Board vs. All Non-Board	6.35 3.65	4.36 3.19	99 97	5.05***	180
All Board vs. All Non-Board	6.12 3.65	4.43 3.19	114 97	4.77***	204
<i>S.D.</i> : standard deviation, <i>n</i> : sample size, <i>t</i> : T-statistic, <i>df</i> : degrees of freedom, *, **, ***: statistically significant at $p < .05$, $p < .01$, and $p < .001$, respectively (one-tailed); means of significant differences are highlighted in bold font.					

with Bluescape rather than Elliott. Elliott sold its shares less than a year later, but Bluescape remains invested in the company four years later.

Comparison of means using a one-tailed heteroscedastic *t*-test showed that the average size of investment for successful activist board representation campaigns is significantly higher than the average size of investment for non-board level campaigns, $t(180) = 5.05, p < .001$, and the same held true when comparing all board representation campaigns to non-board level campaigns, $t(204) = 4.77, p < .001$. The same high significance levels were obtained using a two-tailed *t*-test.

Chart 8 – Average Maximum Stake for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)

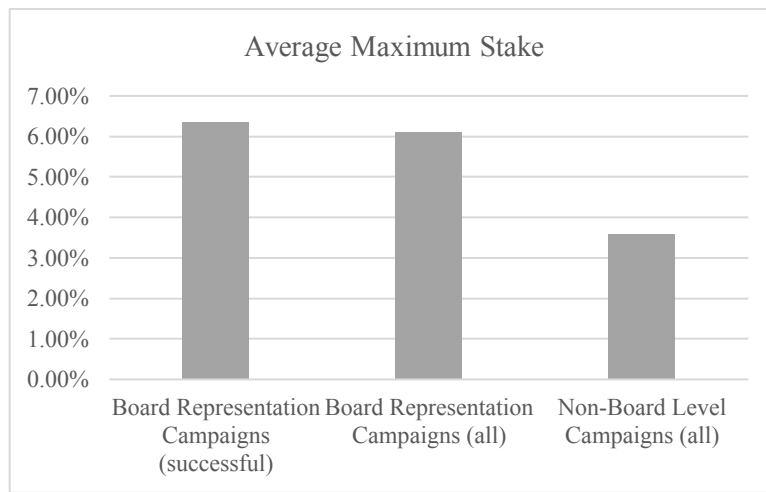
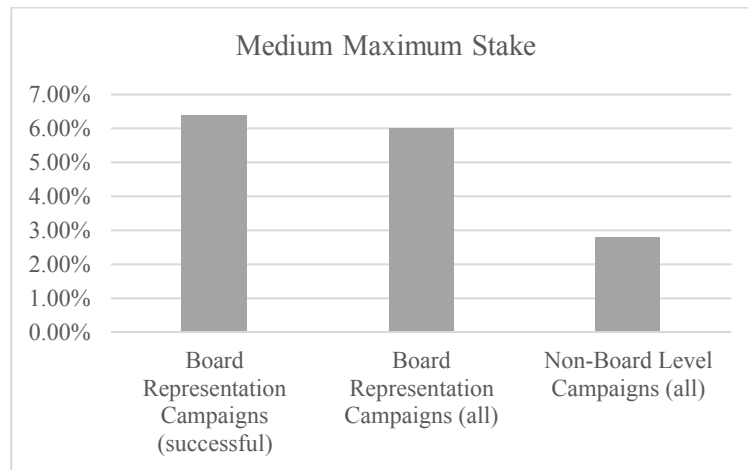
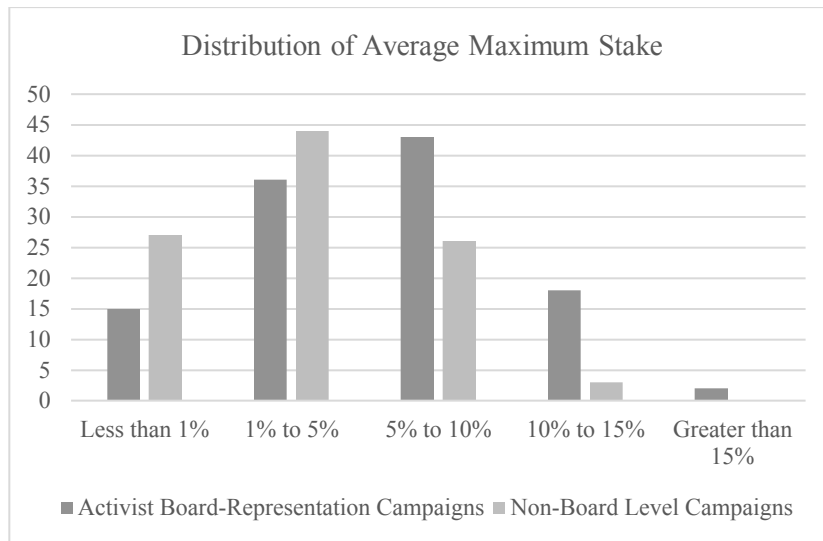


Chart 9 – Median Maximum Stake for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



The above Charts, 8 and 9, depict the average and medium stakes for activist board representation campaigns and non-board level campaigns, and Chart 10 below illustrates the distribution of the average stakes that the activist hedge funds hold in their target companies.

Chart 10 – Distribution of Average Maximum Stake for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



4. Campaign Objectives

i. Methodology

Various sources were used to discover the objectives and campaign tactics of the activist hedge fund campaigns. Firstly, in the cases where a Schedule 13D was filed, Item 4 of the Schedule 13D filing requires that the activist declare its reasons for acquiring the target company shares, “especially if the intention is to engage in a merger and acquisition activity, seek a sale of any material amount of the issuer’s assets, pursue a change in its capitalization or dividend policy, or propose other types of corporate changes.”²⁵⁹ As a result, 13D filings are useful sources of information regarding the activists’ plans. Once the initial Schedule 13D is filed, there is also a requirement for activists to promptly file Schedule 13D amendments if there is any material change in their plans for the company. Secondly, as my dataset involved such large, prominent S&P 500 companies, and mostly involved high-profile activist hedge funds, many of the campaigns were publicly announced either in news articles or on specially designed websites

²⁵⁹ *Governance by Persuasion*, *supra* note 82, at 13.

launched by the activist hedge funds to accompany their campaign. Such websites, and the white papers or discussion papers that were often posted to these websites, gave incredibly detailed information regarding the purpose of the activist hedge funds' campaigns. Extensive searches were carried out on Google and Factiva to find relevant news articles and campaign websites. Thirdly, the Activist Insight website also contained summaries of campaign strategies used for activist campaigns at different target companies, together with links to further news articles. Combining all of these sources enabled me to build up a comprehensive picture of the strategies that were being pursued at each target company.

Therefore, beyond the categorization of campaigns into activist board representation or non-board level campaigns, I also recorded the activist hedge funds' proposed motives for each campaign. Here, I used four general categories of objectives, with various subcategories as detailed below:

Category 1 – Financial / Balance Sheet Activism

- a. Dividends
- b. Excess Cash / Share Repurchase
- c. Capital Structure / Recapitalization
- d. Sell Assets

The first category is similar to the “Capital Structure” category used in the study by Brav, Jiang, Partnoy, and Thomas, where the authors recorded if the activist campaign focused on a reduction of excess cash, an increase in firm leverage, or higher payouts to shareholders using either dividends or share repurchases.²⁶⁰ As noted previously, this is the most commonly criticized form of hedge fund activism that is strongly associated with the short-termist financial engineering narrative.

Category 2 – Strategic / Operational Activism

- a. Business Focus
- b. General Strategy / Growth Strategy
- c. Operational Efficiency / Cost Cutting
- d. Business Restructuring

Again, this category was relatively similar to the “Business Strategy” category used in the study by Brav, Jiang, Partnoy, and Thomas.²⁶¹ Here, the authors included general operational efficiency, cost-cutting and tax efficiency-enhancing proposals within the business strategy category, as

²⁶⁰ *Hedge Fund Activism*, *supra* note 83, at 1741, 1742 tbl.1.

²⁶¹ *Id.*

well as proposals to spin-off divisions or refocus the business strategy, and playing an activist role in a pending merger or acquisition, generally by asking for a better price when the firm is the target of the acquisition or by trying to stop the pending acquisition.²⁶² I included spin-offs in the below category on M&A activism, but it equally could have been included in this category. I also included activist intervention in mergers and acquisitions in a separate M&A category.

Category 3 – M&A Activism

- a. Push for Sale of Company/Merger
- b. Oppose Sale of Company/Merger
- c. Spin-off / Sale of Business Division
- d. Support Acquisition of Third Party
- e. Oppose Acquisition of Third Party
- f. Oppose Price/Terms of Merger

Brav, Jiang, Partnoy, and Thomas included a separate category for “Sale of Target Company,” which included activism urging the sale of the target company either to a third party (which comprised the majority of cases) or to take over the company themselves.²⁶³ In their study, other mergers and acquisitions related activity was included in the “Business Strategy” category.²⁶⁴

Category 4 – Governance Activism

- a. Remove/Replace CEO
- b. Separate Chairman & CEO
- c. Board Composition & Independence
- d. Eliminate Staggered Board
- e. Other Governance

Finally, this category was also similar to the final category of “Governance” in the study by Brav, Jiang, Partnoy, and Thomas. In that category, the authors included rescinding takeover defenses (declassifying the board or revoking poison pills), ousting the CEO or chairman, challenging board independence and fair representation, demanding more information disclosure and questioning potential fraud, and challenging the level or pay-for-performance sensitivity of executive compensation.²⁶⁵

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1741,1742 tbl.1, 1744.

When analyzing the campaign strategies, I excluded from the total number of events multiple campaigns at the same company and the non-board level campaigns at companies that were also targets of activist board representation, to avoid double-counting strategies or outcomes. Therefore, the total number of events was 189 as the total number of activist board representation events was 115 (rather than 126) and the total number of non-board level events was 74 (rather than 102).

ii. Results

Table 9 – Summary of Events by Activist Hedge Fund Campaign Objective

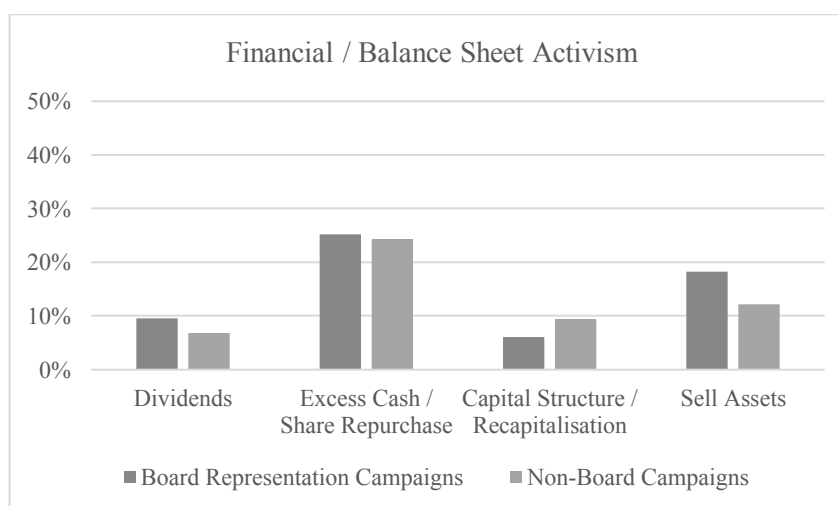
This table includes 189 events. The table reports the summary of the events sorted by hedge funds' campaign objectives. Columns 1 and 2 report the number of events, and the percentage among all events, of each category. Columns 3 and 4 list the number of events, and the percentage among all events, for activist board representation campaigns. Columns 5 and 6 list the number of events, and the percentage among all events, for non-board level campaigns (where the target company was also not the target of an activist board representation campaign). Percentages sum up to more than 100% since one event can have multiple objectives.

Categories	All Events		Board Representation Campaigns		Non-Board Level Campaigns	
	Number of Events (1)	% of Sample (2)	Number of Events (3)	% of Cases (4)	Number of Events (5)	% of Cases (6)
Financial/Balance Sheet Activism						
Dividends	16	8.5%	11	9.6%	5	6.8%
Excess Cash / Share Repurchase	47	24.9%	29	25.2%	18	24.3%
Capital Structure / Recapitalization	14	7.4%	7	6.1%	7	9.5%
Sell Assets	30	15.9%	21	18.3%	9	12.2%
Strategic/Operational Activism						
Business Focus	24	12.7%	23	20%	1	1.4%
General Strategy/Growth Strategy	50	26.4%	47	40.9%	3	4.1%
Operational Efficiency/Cost Cutting	55	29.1%	48	41.7%	7	9.5%
Business Restructuring	31	16.4%	27	23.5%	4	5.4%
M&A Activism						
Push for Sale of	49	25.9%	27	23.5%	22	29.7%

Company/Merger						
Oppose Sale of Company/Merger	5	2.6%	3	2.6%	2	2.7%
Spin-off/Sale of Business Division	60	31.7%	43	37.4%	17	23%
Support Acquisition of Third Party	9	4.8%	4	3.5%	5	6.8%
Oppose Acquisition of Third Party	12	6.3%	3	2.6%	9	12.2%
Oppose Price/Terms of Merger	3	1.6%	1	0.9%	2	2.7%
Governance Activism						
Remove/Replace CEO	34	18%	31	27%	3	4.1%
Separate Chairman & CEO	4	2.1%	4	3.5%	0	0%
Board Composition and Independence	20	10.6%	15	13%	5	6.8%
Eliminate Staggered Board	6	3.2%	5	4.3%	1	1.4%
Other Governance	41	21.7%	35	30.4%	6	8.1%

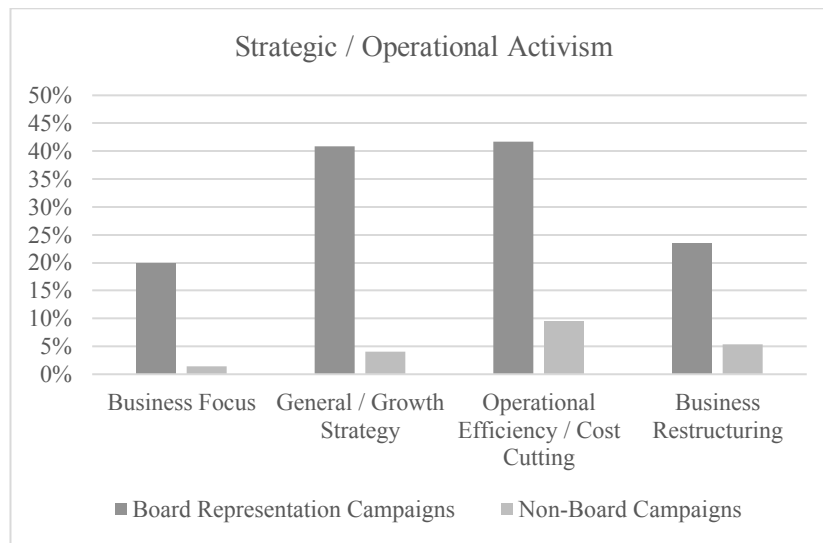
The below charts illustrate the comparisons in campaign strategies between activist board representation campaigns and non-board level campaigns.

Chart 11 – Financial or Balance Sheet Activism for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



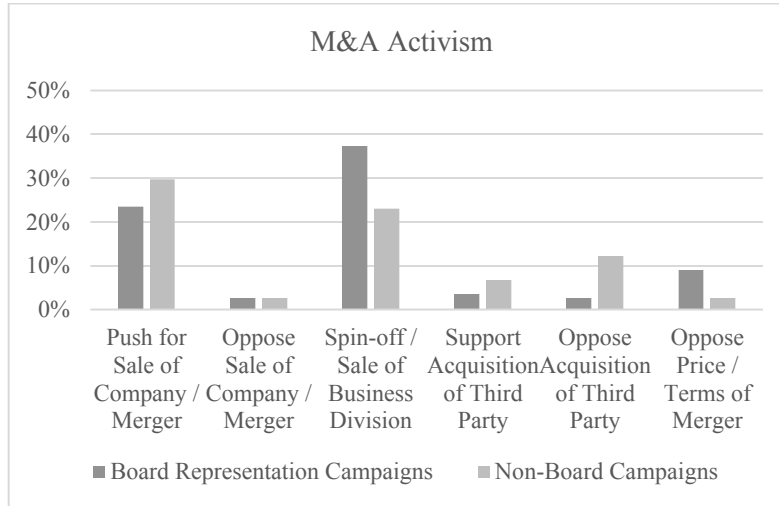
Firstly, for financial or balance sheet activism, activist board representation campaigns and non-board level campaigns present reasonably similar. The only major difference is a slightly higher incidence of campaigns where the activist pushes for the company to sell assets when they also campaign for board representation (18.3% of campaigns compared to 12.2% of campaigns).

Chart 12 – Strategic and Operational Activism for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



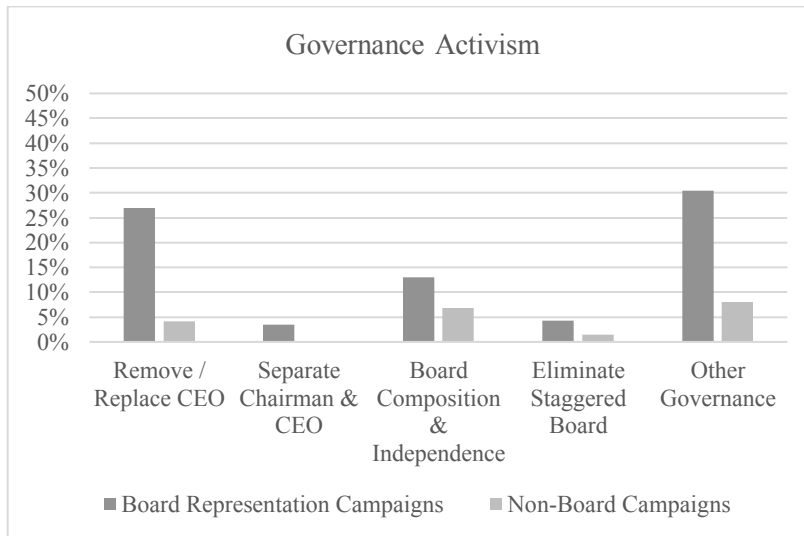
For strategic and operational activism, there are major differences between the strategies campaigned for in activist board representation campaigns compared with non-board level campaigns. The chart shows that strategic and operational activism is almost always accompanied by a request for activist board representation.

Chart 13 – M&A Activism for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



For M&A activism, there are not major differences, although there is a larger proportion of activist board representation campaigns that advocate for spin-offs or sale of business divisions (37.4% compared to 23% of cases). As noted earlier, spin-offs could have been included within the strategic and operational activism category.

Chart 14 – Governance Activism for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



Finally, for governance activism, hedge fund activists are much more likely to campaign to replace the CEO when they are requesting board representation. In 27% of cases involving activist board representation, there is also a request to replace the CEO, compared to only 4.1% of non-board level campaigns.

In the study by Brav, Jiang, Partnoy, and Thomas, it was highlighted that different types of campaign objectives generate different abnormal returns for activists. In their 2001 to 2006 data, Merger and Acquisition (“M&A”) activism that was aimed at selling the target company proved to generate the highest abnormal returns, with an average of 8.54%. Activism associated with business strategy also generated high returns, averaging 5.95%.²⁶⁶ By contrast, activism targeting capital structure and governance issues generated smaller average returns for hedge funds, at 1.47% and 1.73%.²⁶⁷

5. *CEO Turnover*

i. Methodology

In Section 4 above, it was noted that in 27% of campaigns involving activist board representation, there was a request to replace the CEO, compared to only 4.1% of non-board level campaigns. As requests to replace the CEO seemed a particularly common campaign strategy for activist board representation campaigns, I also analyzed the outcome of these campaigns in terms of whether the CEO was ultimately replaced while the activist intervention was ongoing.

Data on CEO replacements could be gleaned from analyzing the Form 8-K filings for the relevant companies and also by conducting Google and news searches. The departure of CEOs from S&P 500 companies was always reported in the media, so it was relatively easy to collect information on the dates CEOs stood down and to confirm this using the official Form 8-K filings available from the SEC EDGAR Database.

ii. Results

During the activists’ tenure, there were 68 new CEOs at the 101 companies that were targets of activist board representation (68 out of 112 events, or 61% of events, as joint campaigns were excluded). At 55% of these 101 companies (56 companies), the CEO was replaced at least once during the activist’s tenure. The number of actual CEO replacements is higher than the number of companies where the CEO was replaced because there were multiple CEO replacements at ten companies.²⁶⁸ If only

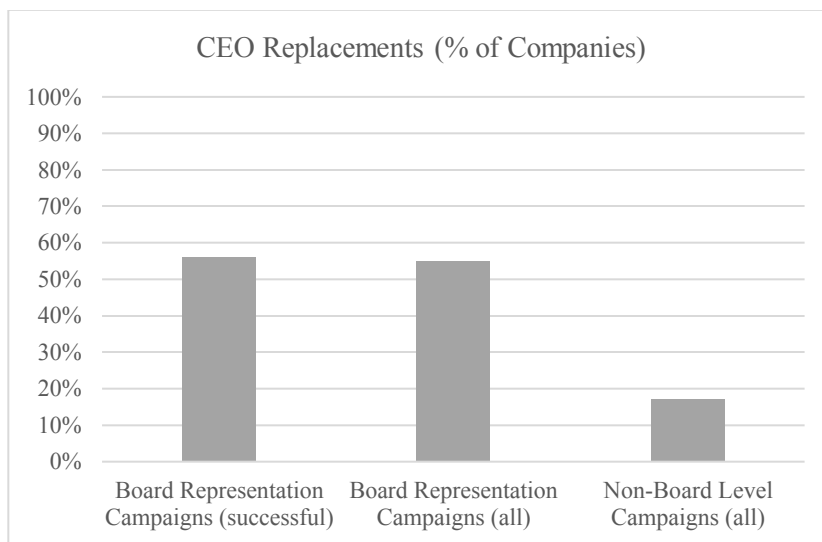
²⁶⁶ *Hedge Fund Activism*, *supra* note 83, at 1759.

²⁶⁷ *Id.*

²⁶⁸ At Alliance Data Systems, the CEO was replaced twice in 2019 during ValueAct Capital’s tenure; at Arconic (now Howmet Aerospace), the CEO was replaced four times during Elliott Management’s tenure (in 2016, 2017, 2018, and 2019); at Citrix Systems, the CEO was replaced twice

successful activist board representation campaigns are included, the CEO was replaced at 56% of companies successfully targeted (50 out of 90 companies). In non-board level activist campaigns, the CEO was replaced in 17% of campaigns (11 out of 64 companies) and 15% of events (11 out of 74 events), as illustrated in Chart 15 below.

Chart 15 – Percentage of Companies with CEO Replacements for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



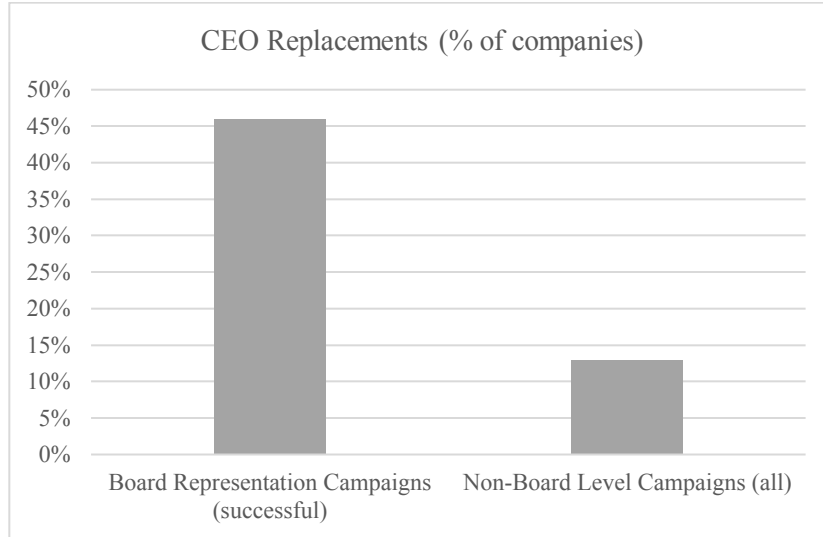
One plausible interpretation of this data would be that if activist board representation campaigns have a longer investment period, the CEO is more likely to be replaced during the activist's tenure. Other studies have examined whether CEOs have stood down within a certain time following activist intervention. For example, in the Brav, Jiang, Partnoy, and Thomas study, they noted that “[d]uring the year after the announcement of activism . . . the CEO turnover rate increases by almost [ten] percentage points” for their sample of activist events from 2001 to 2006.²⁶⁹ Therefore, to avoid that (legitimate) criticism, I also collected data on how soon CEOs left after the

during Elliott Management's tenure (in 2015 and 2017); at CSX Corporation, the CEO was replaced twice in 2017 during Mantle Ridge's tenure; at Iron Mountain, the CEO was replaced twice during Elliott Management's tenure (in 2011 and 2012); at JCPenney Company, the CEO was replaced twice during Pershing Square Capital Management's tenure (in 2011 and 2013); at Perrigo Company, the CEO was replaced twice during Starboard Value's tenure (in 2017 and 2018); at Wells Fargo, the CEO was replaced twice during GAMCO's tenure (in 2016 and 2019); at Xerox, the CEO was replaced twice during Carl Ichan's tenure (in 2016 and 2018); and at Yahoo!, the CEO was replaced twice during Third Point's tenure (in 2012 and 2017).

²⁶⁹ *Hedge Fund Activism*, *supra* note 83, at 1732.

activists were granted board seats, and in particular whether CEOs stood down within a year of the activist being granted board seats.

Chart 16 – Percentage of Companies with CEO Replacements Within One Year for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



In 46% of companies where activists were successful in securing board seats, the CEO stood down either shortly before board seats were granted to the activist or within one year of the board seats being granted (41 out of 90 companies). Similarly, if this exercise is repeated for the non-board level campaigns (measuring from the date of activist involvement rather than when the board seats were granted), the percentage of non-board level campaigns where CEOs exited within one year of activist involvement is 13% (8 out of 64 companies).

A 2021 report by Lazard outlines that the baseline CEO turnover for S&P 500 companies is between 10% and 12% each year.²⁷⁰ Therefore, it seems that non-board level activism does not have much effect on CEO turnover, whereas activist board representation increases the likelihood of CEO turnover significantly.

As noted in Part II, activist hedge fund campaigns are not thought to be kind to CEOs of target firms.²⁷¹ The above data on CEO turnover shows that hedge fund activism is much less kind to CEOs when activists seek and secure board representation, compared to cases where there is no activist board representation.

²⁷⁰ LAZARD, 2021 REVIEW OF SHAREHOLDER ACTIVISM 16 (2022), https://www.lazard.com/medi a/451963/lazards-q4-2021-review-of-shareholder-activism_vf.pdf.

²⁷¹ See *supra* Part II.B.5 (citing *Hedge Fund Activism*, *supra* note 83, at 1732).

6. *Types of Activist Director*

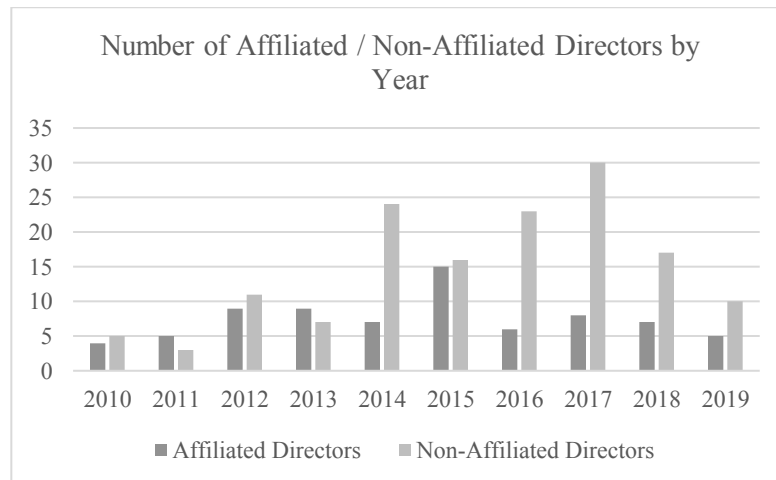
i. Methodology

As noted in Part II, activist director nominees can either be affiliated directors who work at the activist hedge fund, or non-affiliated directors who are selected by the hedge fund. I recorded data on whether each director who secured a board seat was affiliated or non-affiliated with the hedge fund. This information was readily obtainable from news reports publicizing the appointment of the directors, and this information was also confirmed by checking the official Form 8-K filing with the SEC. Whether a director was affiliated or non-affiliated was also simple to ascertain simply by conducting a Google search of who the director was. This information was also often reported in settlement agreements negotiated between the activist hedge fund and the target company. Therefore, there were many different ways to verify the information regarding the relevant director's affiliation.

ii. Results

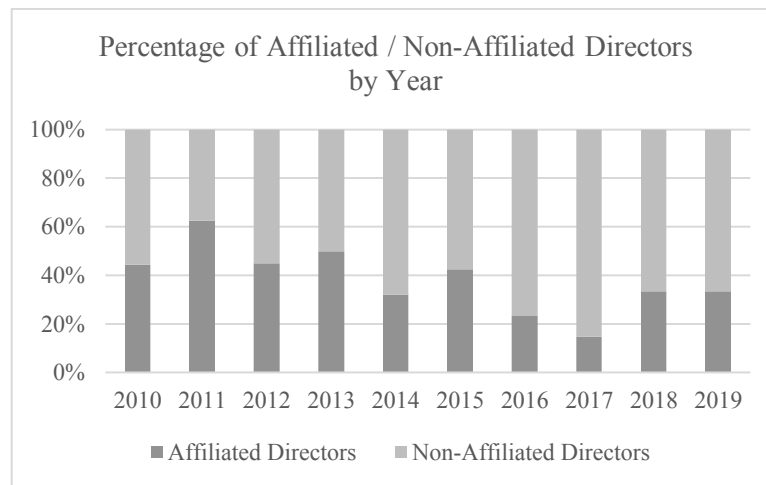
Of the 218 board seats gained by hedge fund activists at S&P 500 companies in campaigns launched between 2010 and 2019, 74 seats (34%) were secured by directors affiliated with the activist hedge funds and 144 seats (66%) were secured by non-affiliated directors. Although there is some variability from year to year, in the more recent years of the sample, the proportion of affiliated directors has generally decreased, as shown in the chart below.

Chart 17 – Number of Affiliated and Non-Affiliated Directors by Year for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



The clear trend, therefore, is towards the appointment of non-affiliated directors as opposed to hedge fund principals themselves taking seats on boards. In each year of the sample since 2014, the number of non-affiliated directors has been higher than the number of affiliated directors. In some campaigns, there were a mix of affiliated and non-affiliated directors appointed.

Chart 18 – Percentage of Affiliated and Non-Affiliated Directors by Year for Activist Board Representation Campaigns and Non-Board Level Campaigns at S&P 500 Companies (2010 to 2019)



The appointment of affiliated or non-affiliated directors does, however, tend to vary by hedge fund. For example, Trian Fund Management and ValueAct Capital Partners always had at least one affiliated director on the board of target companies, without exception. Indeed, Trian exclusively put affiliated directors on the boards (which was atypical behavior compared to other activist hedge funds).²⁷² By way of comparison, in almost all of Elliott Management's campaigns, non-affiliated directors were appointed rather than representatives from the hedge fund itself.

Activist hedge funds tended to stay invested in target companies longer when there was at least one affiliated director on the board. The average investment period for campaigns where at least one affiliated director was appointed was three years and nine months (3.79 years) compared to two years and eight months (2.70 years) when only non-affiliated directors were on the board.

²⁷² In each of the successful campaigns initiated by Trian Fund Management at S&P 500 companies from 2010 to 2019, the appointed directors were fund principals at Trian. These individuals included Nelson Peltz (Trian's CEO and Founding Partner), as well as other Partners of Trian.

7. *Activist Settlements*

i. *Methodology*

As noted earlier, activist campaigns can either proceed to a shareholder vote through a proxy contest, or be settled by a negotiated agreement between the activist hedge fund and the target company. Proxy contests were heavily publicized and reported, and were also detailed in the Activist Insight database. Settlement agreements are filed with the SEC, so they are also publicly available.

ii. *Results*

In my dataset, 85% of events where activists sought board representation were settled (107 of 126 events). There were only eight events (6% of the activist board representation campaigns) at seven companies in my sample that proceeded to a proxy contest.²⁷³ All of the other board seats were gained through settlements. Additionally, one of the proxy contests—Trian Management's campaign at Procter & Gamble in 2017—also ultimately resulted in a settlement agreement. Only twelve events involved the activist hedge fund withdrawing or the campaign being unresolved, and one of the cases of withdrawal also resulted in a later settlement agreement (Carl Icahn's campaign at TEGNA Inc.).²⁷⁴

In terms of the actual number of seats gained via settlements compared to via proxy contests, of the 216 board seats gained, only fourteen board seats (6.5%) were gained via proxy contests, compared to 202 board seats (93.5%) being secured via settlement agreements. The fourteen seats gained via proxy contests are also heavily skewed by the twelve board seats won by Starboard Value in its campaign at Darden Restaurants in 2014. The other two board seats secured via a proxy contest were Carl Icahn's campaign at Forest Laboratories in 2012 and Alder Investment Management's campaign at International Game Technology plc in 2013. Therefore, in my dataset, no board seats were won at S&P 500 companies by activist hedge funds through proxy contests between 2015 and 2019. This shows how rare proxy contests are compared to negotiated settlements, at least for the major activist hedge funds that have initiated campaigns at the biggest companies in the United States. It also shows that when a target company does choose to fight an activist intervention for board seats, there is a reasonable chance of success. In the four proxy contests that were fought in the dataset between 2015 and

²⁷³ The companies were Forest Laboratories (Icahn Enterprises) in 2011 and 2012, International Game Technology (Ader Group) in 2013, Darden Restaurants (Starboard Value) in 2014, DuPont (Trian Fund Management) in 2015, General Motors (Greenlight Capital Management) in 2017, Procter & Gamble (Trian Fund Management) in 2017, and Automatic Data Processing (Pershing Square) in 2017. Between 2020 and 2023, after my sample period ended, there have only been two additional proxy contests at S&P 500 companies and both concerned ESG issues. These campaigns were Engine No. 1's campaign at ExxonMobil in 2021 and Icahn Enterprises' campaign at McDonald's in 2022.

²⁷⁴ Albeit not one where the activist secured board representation.

2019, the activist hedge fund was not successful in the shareholder vote. These campaigns were Trian Fund Management's campaign at DuPont in 2015, Trian Fund Management's campaign at Procter & Gamble in 2017, Greenlight Capital's proxy contest at General Motors in 2017, and Pershing Square Capital's proxy contest at Automatic Data Processing in 2017. Since the cutoff point in my dataset (campaigns initiated before 2020), there has been one other activist hedge fund campaign that proceeded to a full shareholder vote where the activist hedge fund successfully won seats. This was Engine No. 1's campaign at ExxonMobil in 2021.²⁷⁵

C. Discussion and Implications

1. Safeguards

i. Minority Board Representation

The empirical analysis has suggested some likely virtues of activist board representation, especially in terms of the activist hedge funds generally having a more long-term investment horizon and potentially focusing on sustainable value creation through strategic and operational improvements. Of course, not all cases of activist board representation will have a positive impact on target companies.²⁷⁶ Nevertheless, there are some safeguards inherent in minority board representation that do not operate in cases where activists take full control of the board (as the corporate raiders did in the 1980s). The criticisms directed at activist hedge funds are often similar to those made of corporate raiders (some of whom reinvented themselves as hedge fund activists). There are certainly examples of activist hedge funds attempting to overthrow entire boards. Starboard Value's successful campaign at Darden Restaurants has already been highlighted. Other examples are the campaigns launched at Yahoo!—where the activist hedge fund Starboard Value launched a proxy contest in 2016 to replace the entire board, including CEO Marissa Mayer²⁷⁷—and at Newell Brands—where Starboard Value again nominated a full slate of candidates to the board in 2018, including two directors who had very recently resigned from the board.²⁷⁸ However, activist campaigns to take full control of corporate

²⁷⁵ See Christie, *supra* note 195, at 927–34.

²⁷⁶ A commonly cited example of destructive hedge fund activism involving board representation is Pershing Square's investment in JCPenney, where Bill Ackman of Pershing Square was appointed to the board. Coffee and Palia describe this case as “the best known example of such a financial disaster caused by aggressive intervention by hedge funds” as JCPenney's stock price fell almost sixty percent between the initial Schedule 13D filing and Ackman's eventual resignation from the board. Coffee & Palia, *supra* note 14, at 584.

²⁷⁷ See Michael Flaherty & Supantha Mukherjee, *Starboard Launches Proxy Fight to Remove Entire Yahoo Board*, REUTERS (Mar. 24, 2016, 5:18 PM), <https://www.reuters.com/article/us-yahoo-starboard-proxy-idUSKCN0WQ0D7/> (reporting on Starboard Value's proxy contest at Yahoo!).

²⁷⁸ Nivedita Balu, Vibhuti Sharma & Harry Brumpton, *Starboard Nominates Candidates to Replace Newell's Board*, REUTERS (Feb. 12, 2018, 3:35 PM), <https://www.reuters.com/article/us-newell-brands-starboard-idUSKBN1FW1G0/>.

boards are very rare. When the phenomenon of activist board representation first emerged, it was noted that “hedge funds seek to elect a short slate of directors rather than seeking majority control of the board.”²⁷⁹ In the increasing number of cases where activist hedge funds secure board representation, this is still almost always a minority of the overall board. In my sample, although activist hedge fund activists secured between one and twelve board seats in their successful campaigns, the average number of board seats they secured (either for themselves or for non-affiliated directors) was two. Only 11 campaigns out of 110 successful activist board representation campaigns (10%) involved the activist securing more than three board seats,²⁸⁰ and the case of Darden—where the entire board was replaced—was a clear outlier.

There are various levels of safeguards against “bad” cases of activist board representation. First, if activists seek minority board representation, they first have to persuade other shareholders to support their director nominees. This is obviously vital when there is a proxy contest and shareholder vote. However, as outlined earlier, most activist board representation campaigns result in a settlement between the target company and the activist rather than proceeding to a shareholder vote. Indeed, securing minority board representation by way of negotiated settlement is a much cheaper alternative both for the activist and the company rather than engaging in a proxy contest. Nevertheless, safeguards also operate when activists and target companies enter into a negotiated settlement to appoint activist directors. For example, it is good practice for target company managers to seek the views of other long-term shareholders on the proposed director candidates. As outlined earlier, global asset managers and other long-term shareholders are increasingly insisting that companies do so before settling with activists.²⁸¹

Moreover, once activist directors are appointed, they will still need to convince the rest of the board to implement any proposed new strategies or changes (whether the director is affiliated with the activist hedge fund or not).²⁸² As Bebchuk, Brav, Jiang, and Keusch note, this situation differs from the corporate raiders of the 1980s who sought outright control of boards and could thus control corporate strategy entirely.²⁸³ Therefore, there are various

²⁷⁹ *Hedge Fund Activism*, *supra* note 83, at 1748.

²⁸⁰ Starboard Value at Cerner Corporation (four seats); Icahn Enterprises at Chesapeake Energy Corporation (four seats); Mantle Ridge at CSX Corporation (five seats); Starboard Value at Darden Restaurants (twelve seats); Third Point at The Dow Chemical Company (four seats); Icahn Enterprises at Newell Brands (four seats); Starboard Value at Perrigo Company (five seats); Starboard Value at Symantec Corporation (now NortonLifeLock) (four seats); Icahn Enterprises at Xerox (five seats); Third Point Partners at Yahoo! (four seats); and Starboard Value at Yahoo! (four seats). *See infra* Appendix (detailing activist board representation campaigns in the dataset).

²⁸¹ *See supra* Part II.B.7.

²⁸² *See Dancing with Activists*, *supra* note 10, at 22 (explaining that activists are unable to dominate the boardroom without persuading other shareholders).

²⁸³ *Id.*

layers of safeguards to protect against “bad activism” or short-term strategies on the part of activist hedge fund nominees. Activist directors cannot act alone or push through strategies unless the rest of the board agrees.

ii. The Role of Institutional Investors

Relatedly, as mentioned above, institutional investors play an increasingly important role as corporate governance intermediaries in activist campaigns. As demonstrated in the empirical study, the average activist hedge fund holding in activist board representation campaigns at S&P 500 companies is just over six percent. Support from institutional investors who hold a much larger proportion of the shares tends to be necessary for any activist campaign to succeed.²⁸⁴ Institutional investors, therefore, provide valuable support to activists and operate as an important safeguard if activist proposals are not deemed to be in the best interests of the long-term success of the company.

Activist board representation is, however, a specific type of intervention that may appeal to longer-term institutional investors, as when activist hedge funds secure board representation they generally hold shares for longer periods compared to situations where no board representation is involved. The longer-term and more substantive commitment evidenced by activist hedge funds in such campaigns therefore mitigates some of the common concerns of financial wizardry associated with the perceived short-term “hit-and-run” motives of activist hedge funds. Activist hedge funds are also unique in pursuing this form of firm-specific activism that other investors are unlikely to have the capacity or the incentives to initiate. No other activist specializes in the appointment of activist directors who focus on strategy, operations, and turnaround. Activist board representation as a strategy has grown alongside the rise in power of institutional investors, which also may explain why it has become a more common strategy, especially at S&P 500 companies that tend to have particularly large institutional investor holdings.

2. *The Role of Activist Directors on the Board*

As noted earlier, most directors appointed by activist hedge funds are non-affiliated directors.²⁸⁵ When proposing director nominees, activist hedge funds often criticize the lack of industry expertise of the current board, which is a potential issue with the part-time independent directors who feature prominently in the monitoring board model. This can result in the activist nominating industry experts or even former CEOs of the company, or experts in turnaround. There is usually a clear focus on strategy and operations and a

²⁸⁴ See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 896–901 (2013) [hereinafter *Agency Capitalism*] (outlining the importance of institutional investors in activist success).

²⁸⁵ See *supra* Part III.B.6.ii & Chart 17.

motivation for the new directors to get involved in that strategy in order to improve corporate performance.²⁸⁶

For example, when JANA Partners announced that it had added three directors to the board of Tiffany & Co., through a settlement agreement with the company, the executives appointed were all industry specialists who were not affiliated with the hedge fund. The appointees were “Francesco Trapani, the ex-CEO of luxury retailer Bulgari; Roger Farah, co-chief executive of luxury brand Tory Burch; and James Lillie, a former CEO of the consumer products company Jarden Corp.”²⁸⁷ One of the directors (Trapani) was announced as joining Tiffany’s CEO search committee and another of the directors (Farah) became Chairman of the board.

Overall, the activist directors nominated to target company boards may have deep industry expertise and therefore in some respects more closely resemble the directors of the old advisory board, rather than the monitoring board.

3. Board Representation by Other Investors

The major shareholder protagonists that appoint minority directors to boards are activist hedge funds, to the extent that board representation campaigns are now the most common type of hedge fund activism at S&P 500 companies. Board representation campaigns are, of course, not limited to activist hedge funds.²⁸⁸ As briefly explained earlier, campaigns by other shareholders were excluded from the dataset.²⁸⁹ Although other investors will sometimes nominate candidates to corporate boards, there are various reasons why activist hedge funds are the primary instigators of activist board representation campaigns.²⁹⁰ It is more challenging for other types of shareholders to nominate directors to corporate boards for various reasons.²⁹¹ One significant reason is the costs involved in doing so. Of course, it has already been shown that most activist hedge fund board representation campaigns—at least when they involve major hedge funds targeting S&P 500 companies—are settled rather than requiring a proxy

²⁸⁶ See *supra* Part III.B.4.ii, Table 9 & Chart 12 (analyzing data regarding activist focuses and strategies).

²⁸⁷ Flaherty, *supra* note 191.

²⁸⁸ See *supra* Part III.A.2.ii.

²⁸⁹ See *supra* Part III.A.2.iii (noting that campaigns by public pension funds, labor unions, individual gadfly investors, other shareholder organizations, family foundations, and religious organizations were excluded from the dataset). Other studies, such as Klein & Zur, include all campaigns by “entrepreneurial shareholder activists,” which is broader than activist hedge funds. Klein & Zur, *supra* note 83, at 187.

²⁹⁰ See Anna Christie, *Board-Shareholder Engagement and Directors’ Appointments*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 450, 457, 460–463 (Luca Enriques & Giovanni Strampelli eds., 2024) (outlining the myriad reasons activist hedge funds are the main instigators of activist board representation campaigns and discussing the rarity of asset managers themselves nominating directors to boards).

²⁹¹ *Id.*

contest or proceeding to a full shareholder vote.²⁹² However, that tends to be the case only for established players who already have a reputation for running successful activist board representation campaigns. The high costs involved in making a credible threat of a proxy contest means that there is a very small group of activist hedge funds that can successfully pursue activist board representation campaigns at S&P 500 companies.²⁹³ As the data showed, between 2010 and 2019, only thirteen activist hedge funds initiated more than one board representation campaign at an S&P 500 company, and seven activist hedge funds (Icahn Enterprises, Elliott Management, Trian Fund Management, ValueAct Capital Partners, Starboard Value, JANA Partners, and Pershing Square Capital Management) were responsible for more than seventy-two percent of all activist board representation campaigns at S&P 500 companies.²⁹⁴ Therefore, the strategy of seeking and securing board representation is somewhat restricted to the largest and most formidable activist hedge funds. New entrants or other investors may have to launch and conduct a full proxy contest in order to establish a reputation and to have future campaigns taken seriously by large corporations. An example of this was the newly established activist fund Engine No. 1's campaign at Exxon,²⁹⁵ which involved the fund reportedly spending approximately \$30 million on their proxy contest.²⁹⁶ Such costs are prohibitively expensive for most investors, who may have to pursue different strategies if they are seeking a refresh of the board. It is much more common for other investors (including non-governmental organizations, public pension funds, labor unions, religious organizations, or individual "gadfly" investors) to pursue their activist campaigns through the shareholder proposal mechanism, rather than by nominating directors to corporate boards.²⁹⁷ Why do activist hedge funds still pursue board representation despite the high costs involved in these types of interventions that prove to be a major impediment for other types of investors? Activist hedge funds have stronger incentives to pursue costlier forms of activism because their concentrated holdings in a small number of portfolio companies, and their compensation structure, means that they can effectively capture a significant proportion of value-generating strategies.

²⁹² See *supra* Part III.B.7.ii (noting that eighty-five percent of activist board representation events were settled, whereas only six percent of activist board representation campaigns at seven companies in the sample proceeded to a proxy contest).

²⁹³ See *supra* Part III.B.1.iii (showing six activist hedge funds were responsible for more than two-thirds of all activist board representation campaigns at S&P 500 companies).

²⁹⁴ See *supra* Part III.B.1.iii (showing that only thirteen activist hedge funds initiated more than one board representation campaign at an S&P 500 company in the ten years from 2010 to 2019).

²⁹⁵ Christie, *supra* note 195, at 927–34.

²⁹⁶ Jennifer Hiller & Svea Herbst-Bayliss, *Exxon, Activist Spend over \$65 mln in Battle for Oil Giant's Future*, REUTERS (Apr. 15, 2021, 4:44 PM), <https://www.reuters.com/business/energy/exxon-activist-spend-over-65-mln-battle-oil-giants-future-2021-04-15/>.

²⁹⁷ See generally Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569 (2021).

4. *Generalizability of Results*

This empirical study focused on activist board representation at S&P 500 companies. It is an open question whether the findings of the dataset could be generalized to a wider universe of companies in the United States. This would involve further data collection and analysis. There are likely to be some similar features of campaigns, especially if the same activist hedge funds are involved. However, a broader range of activist hedge funds target smaller companies, so there may well be some divergence in the specific strategies and other aspects of the campaigns.

In terms of generalization to campaigns in other countries, this Article focuses on activist hedge fund campaigns in the United States. The prevalence and relative success of activist hedge fund board representation campaigns varies considerably by jurisdiction. While activist board representation campaigns are very common in the United States, even at large S&P 500 companies, less than ten FTSE 350 companies²⁹⁸ have been similarly targeted in the United Kingdom over the same time period since 2010.²⁹⁹ Campaigns in continental Europe can be even more complex still, especially if there is a two-tier board structure or if companies have controlling shareholders. Recent analysis by Activist Insight has shown that in 2021 there were eighty-six campaigns for activist board representation in the United States³⁰⁰ compared to forty-seven campaigns in the whole of Europe (including the United Kingdom).³⁰¹ These numbers have decreased since 2018 when there were 172 activist board representation campaigns in the United States and seventy-four campaigns in Europe.³⁰² Overall, it is clear that activist board representation is a phenomenon that is much more prevalent in the United States than in other jurisdictions. There are various potential legal and other reasons for this. One overarching reason is simply that activist hedge fund campaigns are much more common in the United States, but there are additional legal reasons why board-level activism in particular may not work so well as a strategy for activist hedge funds in other jurisdictions.

²⁹⁸ The FTSE 350 Index is a market capitalization weighted stock market index made up of constituents of the FTSE 100 and FTSE 250 indices. The FTSE 100 Index comprises the largest 100 companies (by market capitalization) that have their primary listing on the London Stock Exchange. The FTSE 250 Index comprises the next largest companies not covered by the FTSE 100. *See* FTSE RUSSELL, FTSE 350 INDEX 1 (2024), <https://www.ftserussell.com/analytics/factsheets/home/search> (search “FTSE 350 Index”).

²⁹⁹ Targets included National Express Group (Elliott Management) in 2011, Vesuvius (Cevian Capital) in 2012, Rolls-Royce (ValueAct) in 2015, Alliance Trust (Elliott Management) in 2015, Barclays (Sherborne Investors) in 2019, and FirstGroup (Coast Capital) in 2019.

³⁰⁰ That either resulted in a settlement or went to a shareholder vote.

³⁰¹ INSIGHTIA, THE ACTIVIST INVESTING ANNUAL REVIEW 8 (2022).

³⁰² *Id.*

CONCLUSION

More and more of America's largest companies are experiencing the phenomenon of activist directors. Activist board representation was rare prior to 2010, but over the past decade, it has become a core feature of activist hedge fund campaigns at S&P 500 companies. The specific ways in which hedge fund activism manifests differently when directors are appointed reveal several insights regarding the evolution of hedge fund activism. Most strikingly, the relentless focus on short-termism is called into question by the discovery that activist hedge funds focus much more on substantive, long-term strategy and operations when they seek and secure board representation. Routinely dismissed as financial engineers, there is a lack of attention paid to the positive aspects of activist hedge fund campaigns. However, an analysis of the reality of activist board representation campaigns does not neatly fit the short-termism narrative. To the contrary, these campaigns may result in activist directors contributing substantively to value creation over a much longer investment horizon than is commonly associated with activist hedge fund interventions. This revelation prompts some necessary and timely reflection of the traditional critiques of hedge fund activism.

APPENDIX

Activist Board Representation Campaigns (by year board seats sought)³⁰³

	Company	Year	Activist Hedge Fund	Vote or Settlement	Seats Gained
1.	Take-Two Interactive Software, Inc.	2010	Icahn Enterprises	Settlement	3
2.	Biogen Inc.	2010	Icahn Enterprises	Settlement	2
3.	Genzyme Corporation (now Sanofi Genzyme)	2010	Icahn Enterprises	Settlement	2
4.	Occidental Petroleum Corporation	2010	Relational Investors	Settlement	1
5.	Motorola Solutions, Inc.	2010	Icahn Enterprises	Settlement	1

³⁰³ In this table, the date the board campaign was launched, rather than the year the seats were granted, has been used in order to capture the withdrawn or unsuccessful campaigns of activist board representation. The number reflects the distinct companies targeted rather than the total number of events.

6.	Motorola Mobility Holdings Inc.	2011	Icahn Enterprises	Settlement	1
7.	JC Penney Company Inc. (now Penney OpCo LLC)	2011	Pershing Square Capital Management	Settlement	2
8.	Iron Mountain Inc.	2011	Elliott Management	Settlement	2
9.	Electronic Arts Inc.	2011	Relational Investors	Settlement	1
10.	Forest Laboratories Inc.	2011	Icahn Enterprises	Vote	None
11.	The Clorox Company	2011	Icahn Enterprises	Withdrew	None
12.	Family Dollar Stores Inc.	2011	Trian Fund Management	Settlement	1
13.	HP Inc. (formerly Hewlett Packard Company)	2011	Relational Investors	Settlement	1
14.	Illinois Tool Works Inc.	2012	Relational Investors	Settlement	1
15.	C.R. Bard, Inc.	2012	ValueAct Capital Partners	Settlement	1
16.	Yahoo! (now Altaba)	2012	Third Point Partners	Settlement	4
17.	BMC Software Inc.	2012	Elliott Management	Settlement	2
18.	Chesapeake Energy Corporation	2012	Icahn Enterprises	Settlement	4
	Forest Laboratories Inc	2012	Icahn Enterprises	Vote	1
19.	Ingersoll Rand plc (now Trane Technologies plc)	2012	Trian Fund Management	Settlement	1
	Motorola Solutions, Inc.	2012	ValueAct Capital	Settlement	2
20.	Adobe Systems Incorporated (now Adobe Inc.)	2012	ValueAct Capital Partners	Settlement	1
21.	ADT Corporation	2012	Corvex Management	Settlement	1
22.	CBRE Group, Inc.	2012	ValueAct Capital Partners	Settlement	1
23.	International Game Technology	2013	Ader Investment Management	Vote	1

	plc				
24.	Hess Corporation	2013	Elliott Management	Settlement	3
25.	Dell Inc.	2013	Icahn Enterprises	Withdrew	None
	Forest Laboratories	2013	Icahn Enterprises	Settlement	1
26.	Microsoft Corporation	2013	ValueAct Capital Partners	Settlement	1
27.	Air Products & Chemicals, Inc.	2013	Pershing Square Capital Management	Settlement	3
28.	Transocean Ltd.	2013	Icahn Enterprises	Settlement	2
29.	Hologic, Inc.	2013	Icahn Enterprises	Settlement	2
30.	The Williams Companies, Inc.	2013	Corvex Management Soroban Capital Partners (joint)	Settlement	2
31.	WPX Energy, Inc.	2013	Taconic Capital Partners	Settlement	1

32.	Compuware Corporation	2014	Elliott Management	Settlement	2
33.	Mondelez International, Inc. (formerly Kraft Foods)	2014	Triam Fund Management	Settlement	1
34.	eBay Inc.	2014	Icahn Enterprises	Settlement	1
35.	Juniper Networks, Inc.	2014	Elliott Management	Settlement	2
36.	QEP Resources, Inc.	2014	JANA Partners	Settlement	1
37.	Darden Restaurants, Inc.	2014	Starboard Value	Vote	12
38.	Allergan plc	2014	Pershing Square Capital Management	Withdrew	None
39.	Walgreens Boots Alliance, Inc.	2014	JANA Partners	Settlement	2
40.	Interpublic Group of Companies, Inc.	2014	Elliott Management	Settlement	3
41.	Dow Chemical Company	2014	Third Point Partners	Settlement	4
42.	PetSmart Inc.	2014	JANA Partners	Withdrew	None
43.	Bank of New York Mellon Corporation	2014	Triam Fund Management	Settlement	1

	Juniper Networks, Inc.	2014	Elliott Management	Settlement	2
44.	MSCI Inc.	2015	ValueAct Capital Partners	Settlement	3
45.	DuPont (E.I du Pont de Nemours and Company)	2015	Triam Fund Management	Vote	None
46.	EMC Corporation	2015	Elliott Management	Settlement	2
47.	PepsiCo Inc.	2015	Triam Fund Management	Settlement	1
	eBay Inc.	2015	Icahn Enterprises	Settlement	1
48.	TEGNA Inc.	2015	Icahn Enterprises	Withdrew	None
49.	Zoetis Inc.	2015	Pershing Square Capital Management Sachem Head Capital Management (joint)	Settlement	2
50.	MGM Resorts International	2015	Land & Buildings	Withdrew	None
51.	Macerich Company	2015	Land & Buildings	Settlement	2
52.	Conagra Brands, Inc.	2015	JANA Partners	Settlement	2
	Family Dollar Stores Inc.	2015	Elliott Management	Unresolved	None
53.	Qualcomm Incorporated	2015	JANA Partners	Settlement	3
54.	Citrix Systems, Inc.	2015	Elliott Management	Settlement	1
55.	Baxter International Inc.	2015	Third Point Partners	Settlement	1
56.	Sysco Corporation	2015	Triam Fund Management	Settlement	2
57.	Pentair plc	2015	Triam Fund Management	Settlement	1
58.	Twenty-First Century Fox, Inc.	2015	ValueAct Capital Partners	Settlement	1
59.	Freeport-McMoRan Inc.	2015	Icahn Enterprises	Settlement	2
60.	Yum! Brands, Inc.	2015	Corvex Management	Settlement	1
61.	Advance Auto Parts, Inc.	2015	Starboard Value	Settlement	3

62.	Autodesk, Inc.	2015	Sachem Head Capital Partners Eminence Capital Partners (joint)	Settlement	3
63.	Viacom Inc.	2016	SpringOwl Asset Management	Withdrew	None
64.	Xerox Corporation (now Xerox Holdings Corporation)	2016	Icahn Enterprises	Settlement	3
65.	Arconic Inc. (now Howmet Aerospace Inc.)	2016	Elliott Management	Settlement	3
66.	American International Group, Inc.	2016	Icahn Enterprises Paulson & Co (joint)	Settlement	2
	Yahoo! (now Altaba)	2016	Starboard Value	Settlement	4
67.	United Airlines Holdings	2016	Altimeter Capital Management PAR Capital Management (joint)	Settlement	3
	Xerox Corporation (now Xerox Holdings Corporation)	2016	Icahn Enterprises	Settlement	1
68.	Harris Corporation	2016	JANA Partners	Settlement	2
	The Williams Companies, Inc.	2016	Corvex Management Soroban Capital Partners (joint)	Settlement	2
69.	Wells Fargo & Company	2016	GAMCO Investors	Settlement	2
70.	Chipotle Mexican Grill, Inc.	2016	Pershing Square Capital Management	Settlement	2
71.	NRG Energy, Inc.	2017	Elliott Management	Settlement	2
	Arconic Inc. (now Howmet Aerospace Inc.)	2017	Elliott Management	Settlement	3
72.	Perrigo Company plc	2017	Starboard Value	Settlement	5

73.	Cognizant Technology Solutions Corporation	2017	Elliott Management	Settlement	3
74.	CSX Corporation	2017	Mantle Ridge	Settlement	5
75.	Bristol-Myers Squibb Company	2017	JANA Partners	Settlement	3
76.	Tiffany & Co.	2017	JANA Partners	Settlement	3
77.	Alliance Data Systems Corporation	2017	ValueAct Capital Partners	Settlement	1
78.	General Motors Company	2017	Greenlight Capital	Vote	None
79.	The Procter & Gamble Company	2017	Triam Fund Management	Vote & Settlement	1
80.	Pulte Homes, Inc.	2017	Elliott Management	Settlement	3
81.	Automatic Data Processing, Inc.	2017	Pershing Square Capital Management	Vote	None
82.	EQT Corporation	2017	D E Shaw Investment Management	Settlement	2
83.	General Electric Company	2017	Triam Fund Management	Settlement	1
84.	Alexion Pharmaceuticals, Inc.	2017	Elliott Management	Settlement	1
	Xerox Corporation (now Xerox Holdings Corporation)	2017	Icahn Enterprises	Settlement	5
85.	The AES Corporation	2018	ValueAct Capital Partners / Inclusive Capital Partners	Settlement	1
86.	Lowe's Companies, Inc.	2018	D E Shaw Investment Management	Settlement	3
87.	Seagate Technology	2018	ValueAct Capital Partners	Settlement	1
	Pentair plc	2018	Triam Fund Management	Settlement	1
88.	Akamai Technologies, Inc.	2018	Elliott Management	Settlement	2
89.	Newell Brands	2018	Icahn Enterprises Starboard Value	Settlement	4 3

	Inc.				
90.	Navient Corporation	2018	Canyon Capital Advisors	Withdrew	0
91.	Sempra Energy	2018	Elliott Management	Settlement	2
92.	Symantec Corporation (now NortonLifeLock, Inc.)	2018	Starboard Value	Settlement	4
93.	The Campbell Soup Company	2018	Third Point Partners	Settlement	3
94.	Dollar Tree Inc.	2019	Starboard Value	Withdrew	None
	MGM Resorts International	2019	Corvex Management	Settlement	1
	Conagra Brands, Inc.	2019	JANA Partners	Settlement	1
	Navient Corporation	2019	Canyon Capital Advisors	Settlement	2
	The Bristol-Myers Squibb Company	2019	Starboard Value	Withdrew	None
	eBay Inc.	2019	Elliott Management Starboard Value	Settlement	1 1
95.	Marriott International, Inc.	2019	Land & Buildings	Withdrew	None
96.	L Brands, Inc.	2019	Barington Capital	Settlement	None (special adviser)
97.	Cerner Corporation	2019	Starboard Value	Settlement	4
	Occidental Petroleum Corporation	2019	Icahn Enterprises	Settlement	3
98.	Emerson Electric Company	2019	D E Shaw Investment Management	Settlement	1
99.	Marathon Petroleum Corporation	2019	Elliott Management	Settlement	1
100.	Nielsen Holdings N.V.	2020	Elliott Management	Settlement	1
101.	LKQ Corporation	2020	ValueAct Capital Partners	Settlement	1