

The Deal

Activist Spotlight: Insurgencies to Head Backstage

Despite recent high-profile settlements at Occidental and Twitter, activism is expected to take a step back as fallout from the coronavirus changes the activist playbill.

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By Ronald Orol

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As the coronavirus pandemic continues to wreak havoc on the markets, some high-profile activists have scored major wins through settlements.

Nevertheless, outside recent blockbuster agreements, including Elliott Management Corp.'s settlement with Twitter Inc. (TWTR) and Carl Icahn's with Occidental Petroleum Corp. (OXY), it appears that 2020 overall will be a down year for activism. Fewer settlements and director contests are expected as companies and insurgent investors grapple with market uncertainty and fallout from coronavirus pandemic.

Activists have seemingly lost an arrow in their quiver as stock buybacks, special dividends and other capital distributions are in doubt amid government bailouts and widespread cash crunches. At the same time institutional investors are unlikely to support a balance-sheet style activist campaign agitating for capital distributions.

In the current economic environment, activists in many cases are stepping back from campaigns, possibly concerned that they will have less support targeting companies that are grappling with the impact of the coronavirus, noted Paul Schulman, co-head of Morrow Sodali Global LLC's M&A and activist advisory group. He said some companies are much more willing to try to find ways to settle with activists.

In terms of publicly disclosed matters, there were 32 and 27 settlements globally and in the U.S., respectively, in 2020 through March 23, in situations where the company opposed dissident candidates, according to Activist Insight. Both those numbers are lower than the amount of settlements globally and the U.S. during the same period in 2014 through 2019. For example, in 2019, there were 43 and 32 settlements globally and in the U.S., respectively.

To be sure, activism will continue though it may not include as many high-profile situations, such as Icahn's Wednesday, March 25, Occidental Petroleum agreement, which installed three dissident directors, a new chairman and a cost-cutting plan, or Elliott's March 9 deal with Twitter CEO Jack Dorsey that ended what was predicted to be a grueling battle in a matter of weeks with a board seat at the social media giant for the renowned insurgent.

"In some cases, activists and companies are resolving their differences behind-the-scenes," Schulman said. "We are past the peak of the nomination window for activist contests. A number of activists who might have lobbed nominations are either waiting to fight another day or finding ways to resolve their differences with companies out of the public light."

However, campaigns targeting executives and their performance or pay packages, as stock prices tumble, are more in vogue, as seen in recent efforts at Winnebago Industries Inc. (WGO), Harley-Davidson Inc. (HOG), Tegna Inc. (TGNA) and Mack-Cali Realty Corp. (CLI).

Advisers polled by The Deal, however, noted that many agreements are being reached outside of the public eye and may not be captured by statistics. Green Dot Corp. (GDOT) may be a good example. Starboard Value LP's Jeff Smith didn't launch a director contest — or even publicly suggest board candidates — at the financial technology company. The fund, though, which owns a 9.5% position, likely was integrally involved in the company's choice of a new CEO and its move to bring in a new director.

Many other settlements have occurred, with parties willing to reach agreements so companies can focus on dealing with the pandemic. Jason Aintabi's Blackwells Capital LLC on March 20 reached a deal with REIT Colony Capital Inc. (CLNY) to add a mutually agreed-upon director after its main target, CEO Tom Barrack, moved up his departure date.

Engine Capital LP's Arnaud Ajdler reported Thursday that it and PFSweb Inc. (PFSW) came to an agreement that will result in the ouster of the company's chairman at its 2020 annual meeting. Zymeworks Inc. (ZYME), a biotechnology company, reached a deal in early March to install a board representative from 9.9% shareholder Baker Bros. Saddle Point Management LP on Friday struck its first public settlement and gained two director seats at Stericycle Inc. (SRCL).

The Show Won't Always Go On

In some cases, activists are canceling efforts, for fear that their agitation would be perceived poorly by institutional investors of companies struggling with Covid-19-related market realities. However, not everybody is pulling back. Some activists are moving ahead with director fights while companies are publicly criticizing investors for continuing to pursue changes amidst the pandemic.

"Activists are coming under criticism for attacking companies when all these things are going on in the world," one proxy solicitor said.

This month eBay Inc. (EBAY), which is in the midst of finding a permanent chief executive, issued a statement saying it was "disappointed" that Starboard Value is moving forward with its director contest at the online marketplace company "amidst the global COVID-19 pandemic while [its] board and management are trying to focus on the business, employee health and safety," as well as the CEO search and a portfolio review.

Starboard shot back, announcing a four-person board slate and noting it "fully recognizes" the unique state of the markets and country as it faces the pandemic. However, it added that the fund is primarily focused on eBay's "CEO search process and an improved operating plan." The

activists have pushed for sale of eBay's classifieds business, which appears to be under consideration.

The global coronavirus pandemic isn't discouraging Starboard, at least for now. And a continued market sell-off could bring eBay to the negotiating table.

Nevertheless, the battle is one of a much smaller number of contests in the works for 2020, with fewer settlements to follow in the limelight.