



Diligent Market Intelligence

Proxy Season Review 2024

in partnership with

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CAMPAIGN MANAGEMENT



Contributor's foreword



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Shareholder activists enjoyed elevated success rates in 2024, spurred on by universal proxy and the rise of settlement agreements, writes Andrew Freedman, chair, shareholder activism practice group, Olshan Frome Wolosky.

“ Activists ran smaller slates while achieving historically elevated success rates. ”

Shareholder activism in the U.S. continued to ride the strong momentum it gained during the final few months of 2023, particularly among micro-cap companies. During the first half of 2024, 553 U.S. companies were subject to activist demands, representing a 8.4% increase in such demands compared to the first half of 2023, according to Diligent Market Intelligence (DMI) data.

In contrast, Europe saw a slowdown in shareholder activism during the same timeframe, with an 11.1% decrease in the number of companies subject to activist demands. Asia-Pacific countries also experienced a noticeable pullback in activity, headlined by an over 40% drop in the number of companies in South Korea subject to activist demands, after its most prolific activism season in 2023.

Shareholder activists entered the 2024 proxy season with a greater familiarity with the universal proxy card (UPC) rules. Requiring both companies and dissident shareholders to use a UPC that lists all candidates nominated for election has given activists the ability to craft their campaigns to surgically target directors they view as the most vulnerable. With this strategy unlocked, activists ran smaller slates while achieving historically elevated success rates.

Under the new UPC paradigm, settlement agreements between activists and companies are being reached faster and more often. In the first half of 2024, a total of 46 settlements were secured by activists at U.S.-headquartered companies, compared to the 70 that occurred in all of 2023. Additionally, the average time-to-settlement in this year's public campaigns

has been approximately 110 days, representing a 25% compression of the settlement timetable compared to the 147-day average in the first half of 2022 before UPC.

The first-half highlights of 2024 also feature the conclusions of two landmark activist campaigns – one in the U.S. and the other north of the border.

Trian Fund Management launched a campaign at Walt Disney, in what became the most expensive proxy contest in U.S. history. Amid concerns that Disney failed to adapt to industry disruptions and endured chronic management succession failures, Trian ran a slate of two director nominees, including Nelson Peltz and former Disney Chief Financial Officer Jay Rasulo, seeking to “restore the magic” at the company. Despite shareholders ultimately voting to re-elect Disney’s full board at the annual meeting, Trian’s campaign can still be viewed as a success, with Disney’s stock price rising by roughly 50% as of the date of the annual meeting from its 2023 low and the company’s implementation of many of Trian’s suggested financial and operational initiatives.

In Canada, Olshan client Browning West’s historic campaign at Gildan Activewear to replace the entire board featured the rare unanimous recommendation of all three of Institutional Shareholder Services (ISS), Glass Lewis and Egan Jones in favor of the election of the activist’s full slate. The nearly six-month battle concluded when, just days before the annual meeting, Gildan’s entire board resigned, accompanied by the resignation of the CEO. This paved the way for the election of Browning West’s full eight-member slate at the meeting and the restoration of Glenn Chamandy as CEO. The success of this landmark campaign

evoked comparisons in the media to Starboard Value’s storied full-board takeover of Darden Restaurants back in 2014.

The Delaware Chancery Court’s recent decisions regarding the validity of certain provisions of shareholder agreements, most notably in the *Moelis* case, have not too greatly impacted the process by which activist investors reach agreements with companies to improve governance and a board’s composition. Typical activist cooperation agreements are worlds apart from the sort of shareholder agreement giving one investor corporate control that concerned the court in *Moelis*, and there are clear ways to address the legal issues presented by the court’s decision while keeping key cooperation agreement provisions intact. We are hopeful that Delaware will adopt proposed legislation that would have the effect of returning Delaware law to the pre-*Moelis* status quo.

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As a reminder, many shareholder activists are now subject to the newly amended Form N-PX filing requirements applicable to Form 13-F filers. Under the amended rules, Form 13-F filers will be required to file their initial Forms N-PX by August 31, 2024, to report their voting records on “say on pay” proposals during the annual period from July 1, 2023, to June 30, 2024.

Lessons from the 2024 season

An interview with Elizabeth Gonzalez-Sussman and Ryan Nebel, vice chairs of the shareholder activism practice group at Olshan Frome Wolosky.



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2024 has been a busy year for shareholder activism. What lessons did we learn from some of the big campaigns of the season?

Elizabeth Gonzalez-Sussman (EG): Shareholder activism thus far in 2024 has been particularly eventful and has provided several key lessons from some of the major campaigns we saw take place. The campaign at Walt Disney highlighted a critical aspect of shareholder activism: even if an activist loses the election, it can still win the campaign.

In response to Trian Fund Management’s campaign, Disney announced a number of initiatives to address its performance issues, which ultimately helped improve the stock price and contribute to the election of all of Disney’s candidates. Regardless of the immediate outcome of the election, the Disney campaign underscored the fundamental purpose of shareholder activism, to drive company improvements and enhance overall shareholder value.

While not an election contest, Tesla’s success in seeking shareholder approval of two controversial proposals; to ratify the 2018 executive pay package for Elon Musk despite a Delaware court invalidating it, and to approve the reincorporation of Tesla from Delaware to Texas, highlighted the power retail investors can have in certain situations over the strong objections of large institutional investors to these proposals.

Ryan Nebel (RN): The fight of the year so far for activists, Browning West’s eye-opening victory at Gildan Activewear, proved that successful change of control campaigns are not just a thing of the past. In perhaps the most notable change of control victory since Starboard Value’s clean sweep at Darden Restaurants nearly a decade ago, Gildan’s entire board and CEO resigned just days before the annual meeting once it became apparent that Browning West’s entire eight-member slate would be resoundingly elected.

Browning West’s campaign was launched in response to Gildan’s unexpected decision to terminate its co-founder and CEO Glenn Chamandy, which was met with swift and widespread shareholder opposition. Browning West’s change of control victory, which included the reinstatement of Chamandy as CEO, demonstrates the importance of directors listening to the shareholders they serve and shows what can happen if they fail to do so.

Both activists and companies went into the 2024 season more familiar with universal proxy. How did this impact the number of contests vs settlements, compared to a year prior?

RN: As both activists and companies entered the 2024 proxy season more familiar with the universal proxy card (UPC) rules, we saw an increase in settlements, which

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occurred faster and earlier in the process. According to Diligent Market Intelligence (DMI) data, in the U.S., there have already been 48 settlement agreements reached so far in 2024, outpacing the 40 agreements reached at this time last year. Not included in the figures above, we also saw a rise in the use of unofficial settlements this year, such as Engaged Capital at VF Corp, whereby activists and companies came to understandings providing for shareholder-driven change without papering agreements.

Contributing to the wave of early settlements this year was the success activists enjoyed in 2023 during the first full season of the UPC regime. The targeted approach taken by activists in 2023 resulted in a significant percentage of seats won relative to the total sought. With this in mind, many companies elected to quickly settle in 2024 when faced with an activist targeting one or two of the most vulnerable incumbents.

Another relevant factor is that we saw less scorched-earth tactics employed by companies this year. Last year, advance notice bylaws were weaponized by some companies to try to invalidate nominations and prevent the use of UPC and the holding of an election contest. However, the significant shareholder backlash that arose from these short-sighted tactics, many of which ended in litigation or the company relenting, likely brought companies to the table sooner.

2024 played host to several engagements where multiple activists targeted the same company. How might this impact campaigns?

EG: Multiple activists targeting the same company is nothing new, but for it to progress to a three-way election contest like it did at Disney, where both Trian and Blackwells ran competing slates, was extremely unique and will remain exceedingly rare in our view. When activists publicly pursue competing objectives and strategies, it can further divide the shareholder base, result in confusion and ultimately benefit the incumbent management slate. Conversely, if activists are pursuing a similar agenda, their combined efforts can significantly increase pressure on a company and improve the chances of success.

This year also played host to the first ESG proxy fight put forward by a non-traditional activist. Do you expect we will see more ESG advocates adopting activist tactics to push for change?

RN: Potentially, however, a key consideration for such non-traditional activists will be whether they have the resources to employ such tactics effectively and whether they prove to be successful will likely depend upon whether they can tie their ESG-centered concerns to shareholder value propositions.

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The Strategic Organizing Center (SOC), a coalition of labor unions, launched a campaign at Starbucks directed towards the company's resistance to employees' attempts to unionize. With its nomination of three highly-qualified candidates and team of experienced activist advisors, SOC sought to pressure Starbucks to address its human capital issues and the associated risks to shareholder value.

While SOC ultimately withdrew its slate prior to the annual meeting, its campaign is widely viewed as a success given Starbucks' agreement to commence negotiations with Workers United (the union representing Starbucks employees) on a path forward to reach collective bargaining agreements for represented stores, resolve litigation and agree on a fair process for employees to organize. SOC's efforts to hold Starbucks accountable for its labor relations policies helped bring it to the negotiating table with Workers United and may inspire other ESG-focused advocates to run similar campaigns. In order for such campaigns to resonate with shareholders, we believe they will need to have a clear value proposition.

Some investors have voiced concerns regarding litigation impeding the Rule 14a-8 shareholder proposal process. What are your thoughts on this?

EG: We find it concerning that certain companies have chosen to proceed with legal action against their own shareholders who submit proposals under Rule 14a-8. Companies should not sue their shareholders, the true owners of the businesses. When companies receive shareholder proposals under Rule 14a-8, they have the option of pursuing relief through the Securities and Exchange Commission (SEC), pursuant to a formal process that allows companies to challenge the validity or suitability of such proposals – courts are not the appropriate forum.

This year, we witnessed ExxonMobil's decision to move forward with litigation against shareholder proponents of 14a-8 proposals, despite the fact that the shareholders withdrew their proposals. Exxon's approach to handling this situation, even after the proposals were withdrawn, seems rather punitive and designed to chill shareholder engagement. This is not something we would like to see become a trend.

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