2023

The Shareholder Activism Annual Review

The tenth annual review of trends in shareholder activism.

Produced in association with Olshan Frome Wolosky.

insightia a Diligent brand

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Shareholder Activism Annual Review 2023

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Data is global, unless otherwise stated.

Editor's foreword

This year starts with incredibly favorable conditions for activist investors, writes Josh Black.

"Activist investors will now turn to defeating a regulatory attempt to cut the reporting time for their stakebuilding."

Josh Black
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Form goes out of the window at the beginning of proxy season but this year more so than others. A range of macroeconomic and regulatory trends are conspiring to give investors fresh hope of agitating for change, while simultaneously pressuring companies to keep up with the times.

For hedge fund activists, nosediving markets allowed them to outperform during 2022 and provided new targets that can be pushed to improve margins or take more drastic action to maximize value, such as a breakup or sale. Having already won a battle in the U.S. over extreme defensive maneuvers by one activist target, activist investors will now turn to defeating a regulatory attempt to cut the reporting time for their stakebuilding. Boards that assume the support for management that prevailed in proxy fights over the last two years will continue might be guilty of hubris.

Investors more focused on ESG or remuneration will be cheered with the Securities and Exchange Commission's (SEC) rulemaking on executive compensation in 2023 and eagerly anticipating a decision over climate change disclosures in the spring. Elsewhere around the world, ESG activism continues to become more influential. Falling support for director reelections and "say on pay" votes, while still high on average, show that investors are still looking to scrutinize boards of directors.

It will be an exciting proxy season to watch and we will be covering it from every angle over at Insightia. As many of you know, we decided to phase out *Insightia Monthly* at the end of 2022 to focus on providing more in-depth content directly through our newswires. Regular features, such as the wildest campaigns and the adviser awards, will continue.

We will also be able to provide more special reports on a variety of subjects that reflects the reach of our data – from engagement to governance and compensation – as well as some topics that our parent company, Diligent, is well-placed to provide an expert perspective and unique clarity.

On the data front, we are pleased to have made a number of enhancements to our platform recently. First and foremost, we have now moved over from our legacy websites to the new Insightia One platform, where our various datasets become more than the sum of their parts thanks to our advanced search function and tabular layout.

And, as you have probably heard, Insightia added executive compensation data to its platform at the end of last year. With the changes previewed in our December special report on executive compensation, readers will know that this is an exciting area to be expanding into.

I'm pleased to say that we now cover the Russell 3000 index, and will be adding data from companies based in EMEA and APAC coverage soon. We will also be rolling out additional functionality, borrowing from some of the great expertise our Diligent colleagues have in this area, throughout 2023.

Last year, Insightia had the pleasure to become part of Diligent and play a role in its exciting and growing data-as-a-service business, which involved participating in the Modern Governance Summit in September. We have many more developments planned for the coming year across Diligent's five topic tracks: Audit & Analytics; Boards & Governance; Compliance & Ethics; ESG & Diversity; and Risk & Strategy, so stay tuned to this space.

Thanks to Olshan Frome Wolosky and Morrow Sodali for their contributions to this report, as well as extending our thanks to the broader Diligent team for their valuable support. We hope all our readers find the report insightful!

New year, new rules

Activism flourished in 2022, spurred on by the introduction of the universal proxy. The stage is now set for 2023 to play host to new waves of activism, writes Andy Freedman, Chair, Shareholder Activism Practice Group, Olshan Frome Wolosky

"The new universal proxy rules make it more difficult for underperforming companies to shield their weakest directors."

Andrew Freedman
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2022 was a busy year in shareholder activism, which saw the number of campaigns return to pre-pandemic levels in the midst of macroeconomic uncertainties. While disconcerting to many, the market volatility and dampened financial outlook experienced in 2022 created opportunities for activists to deploy the considerable capital they had raised and accumulated during the past several years.

Counteracting the surge in activism was the increased use of more aggressive (and somewhat controversial) defense tactics. While a number of companies adopted poison pills in an attempt to quell potential activism, the most troubling development to us was the adoption of new, unreasonable, and onerous advance notice bylaw provisions that could have the effect of significantly chilling shareholders' ability to nominate directors and ultimately resulting in fewer activist engagements.

We are concerned that broad adoption of these bylaw amendments would also discourage permitted communication and coordination among shareholders concerning their respective investments in public companies to the detriment of the investment industry and free markets.

The universal proxy regime

Despite not taking effect until September 1, 2022 (well after the conclusion of the typical annual proxy season), the new universal proxy rules had a considerable impact on shareholder activism throughout last year.

For campaigns with annual meetings taking place prior to September 1, we saw more fights launched for board control and fewer early-stage settlements, as well as fewer campaigns resulting in settlements. The increase in board control fights was unsurprising, given the common belief that such campaigns may become even more difficult in the universal proxy era.

Meanwhile, the decline in the number of settlements in the first eight months of the year could be attributed to a variety of factors, including the level and type of change being sought by the activists.

Conversely, for campaigns with annual meetings taking place after September 1, we witnessed a considerable number of early-stage settlements. The new universal proxy rules make it more difficult for underperforming companies to shield their weakest directors so, rather than being the guinea pig for the new rules, we saw many companies agree to board refreshes relatively quickly after receiving nominations.

Although there was no immediate wave of campaigns in the second half of 2022, following the implementation of universal proxy rules, the better barometer of any potential surge in activism will be the 2023 proxy season.

While we have been approached by many non-traditional activists and even some non-governmental organizations (NGOs) to explore the possibility of utilizing the new universal proxy rules to advance an ESG initiative, it remains to be seen how many of these organizations will ultimately follow through on it. ■

Back in business

New tools and an economic climate that puts profitability above growth will lay the groundwork for a busy year in activist investing, writes Josh Black.

Activists staged a modest return in 2022, weathering tough market conditions and continued skepticism from companies and institutional investors that positions them to take full advantage in 2023.

"The universal proxy card is likely to drive more settlements or proactive moves by companies to address board weaknesses."

The number of companies publicly subjected to new campaigns by activist investors worldwide hit 929 in 2022, a 6% increase on 2021. That activity was mostly driven by the U.S., Korea, and Japan, each of which saw robust activity focused on capital allocation, board changes, and, naturally, environmental and social demands.

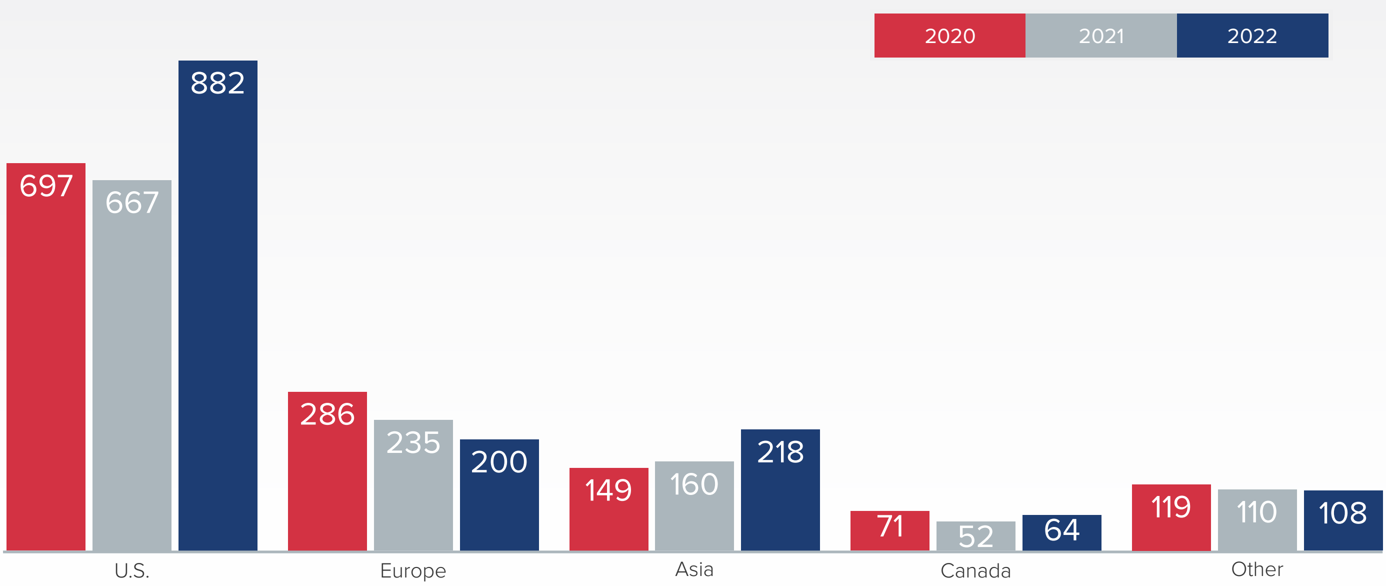
Perhaps most importantly, activists avoided some of the biggest pain points in the market as highly valued growth stocks came crashing down to earth in the face of inflation and recessionary concerns. Insightia's Activist Index recorded a 12.9% loss in 2022, compared with a 25.1% loss for the MSCI World Index – the first outperformance since 2018, which was another down year for the market.

A proxy rich environment

The outlook for activism in the U.S. is perhaps the best in years, despite an extended run of defeats in 2022's marquee campaigns. That is thanks in part to the universal proxy rules, which have sent a jolt through the industry as advisers try to model how the greater choice available to investors will influence voting decisions. According to data from Insightia's *Activism* module, settlements have risen compared with last year since the rules came into effect in September.

"The universal proxy card is likely to drive more settlements or proactive moves by companies to address board weaknesses,

Activist campaigns launched



Number of activist campaigns initiated by company HQ and year.

Source: insightia a Diligent brand

but we won't know the real impact until we get through this first proxy season," Evercore's head of strategic defense and shareholder advisory, Bill Anderson, told Insightia in an interview.

Another factor is the plummeting valuations of technology and media companies, many of which would have been unthinkable as activist targets in previous years. Starboard Value's investment in Salesforce and the double whammy of Third Point Partners and Trian Partners taking on The Walt Disney Co., the latter with the stated intention of running a proxy fight to put Nelson Peltz on the board, suggests there will be little modesty from activists in 2023.

"I would expect to see more contested campaigns this annual meeting season compared to last," J.P. Morgan's head of shareholder engagement for EMEA, Darren Novak, said in an interview. "Activists have gone through the constructive approach, and some appear to be preparing their campaigns in a different way this year to at least provide themselves with increased optionality."

> *"The first half of the year is going to be substantially about capital allocation."*

That is despite a poor return from proxy fights in 2022. Of the 17 proxy contests to go to a vote at U.S.-based companies in 2022, four resulted in activists winning at least one board seat. One of three proxy contests where an environmental or social demand was lodged saw dissident nominees secure a board seat.

"Companies have been more successful in proxy fights in the past two years than they have in previous years," noted Dave Whissel, a senior director at Spotlight Advisors. "If they are settling, they're settling more quickly and for fewer board seats. We're trying to figure out, is this a durable trend, or have these been two anomalous years?"

Activism without M&A?

Activists have been forced to be more judicious about calls to sell the company in recent years, with the number of companies facing such demands globally falling from over 100 in 2019 to just 72 in 2021 and 77 in 2022.

And while many advisers predict activists will return to catalyzing deals in greater numbers once financing markets improve – with healthy debate over how long that might take – few expect dealmaking to be a prominent strategy in the first half of 2023. "The M&A market is not what it was 12 months ago, so it's probably not the ideal time to sell a business," said Whissel.

"The first half of the year is going to be substantially about capital allocation," Novak suggests. "In the second half, to the extent the M&A market becomes more robust again, especially for private equity, we're going to see a huge push in terms of M&A as the solution to companies that have experienced prolonged undervaluation, whether that's the sale of a company as a whole for mid- and small-caps or breakups for large- and mid-caps."

Opposition to deals, either to break up a transaction or to agitate for a price increase, has been more consistent but is also risky in a declining market. "It's a dangerous game of chicken – sometimes shareholders don't have all the information, and many of the deals voted down have resulted in share price collapses," argued Evercore's Anderson.

Breakup demands might keep activists busy, while improving margins and capital allocation appear to be powerful themes going into the new year – especially at companies that have been spending big in the pursuit of growth.

Activist board seat demands

	Settlements					Went to vote (proxy contests*)				
Company HQ	2018	2019	2020	2021	2022	2018	2019	2020	2021	2022
U.S.	150	120	91	67	91	31 (31)	27 (27)	22 (20)	22 (22)	23 (17)
Canada	24	11	11	6	6	14 (11)	7 (5)	10 (6)	5 (5)	4 (3)
Europe	22	23	16	18	9	56 (26)	62 (34)	34 (18)	30 (18)	42 (18)
Asia	5	13	8	4	8	36 (17)	32 (20)	37 (26)	46 (18)	55 (27)
Australia	17	11	8	12	10	24 (20)	30 (27)	33 (28)	27 (19)	23 (17)

Number of resolved activist board representation demands by method and region.
**A proxy contest is defined by Insightia as when dissident nominees receive public opposition from the company.*

Source: insightia a Diligent brand

"In the current environment, portfolio reviews and noncore assets will be prominent for activists in the first six months," said Georgeson CEO Cas Sydorowitz. "Rising interest rates will create a lot of pressure on companies to ensure their balance sheets are stable and not a risk. Wherever you see conglomerate structures, those will be targets."

"Capital allocation arguments are resonating a little more strongly in some sectors," added Whissel. "Activists are saying, it was easy to run a business in good times, but now it's a different environment, and you need to be a lot more careful about how and where you allocate capital."

Europe's moment?

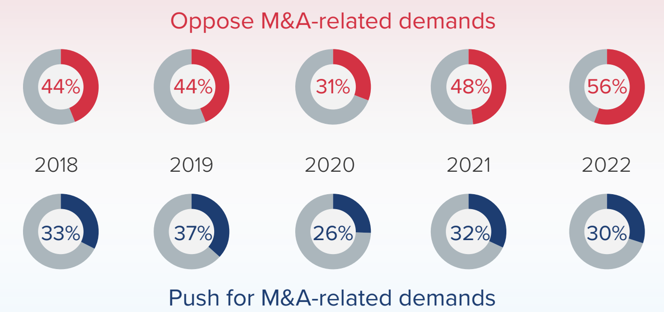
While Asia enjoyed a bumper year for campaigns in 2022, the number of new situations in Europe continued to lag despite a few prominent campaigns at Unilever and Vodafone.

Yet having apparently weathered its withdrawal from Russian energy sources during what was expected to be a tough winter, many now predict that Europe could be an attractive market for activists and private equity.

And while U.S. investors making their way to Europe have tended to observe more constructive approaches, most recently typified by Third Point and Trian, an assertive local activism scene led by Bluebell Capital Partners and Petrus Advisers ensures that the market is every bit as exciting as in North America.

"Europe is moving more toward the American model of activism," said Anderson. "The campaigns may not be as aggressive in terms of the tone of activist letters, but more campaigns are about management change and M&A. The threat of a proxy fight is real in Europe, even if there aren't many that actually proceed to a shareholder vote." ■

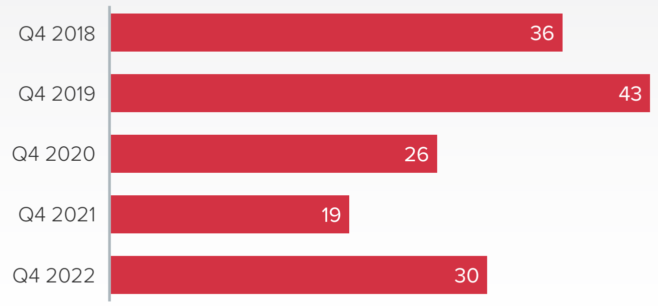
M&A activism success rates



Percentage of M&A-related demands where the activist was at least partially successful, by demand type and outcome year.

Source: insightia

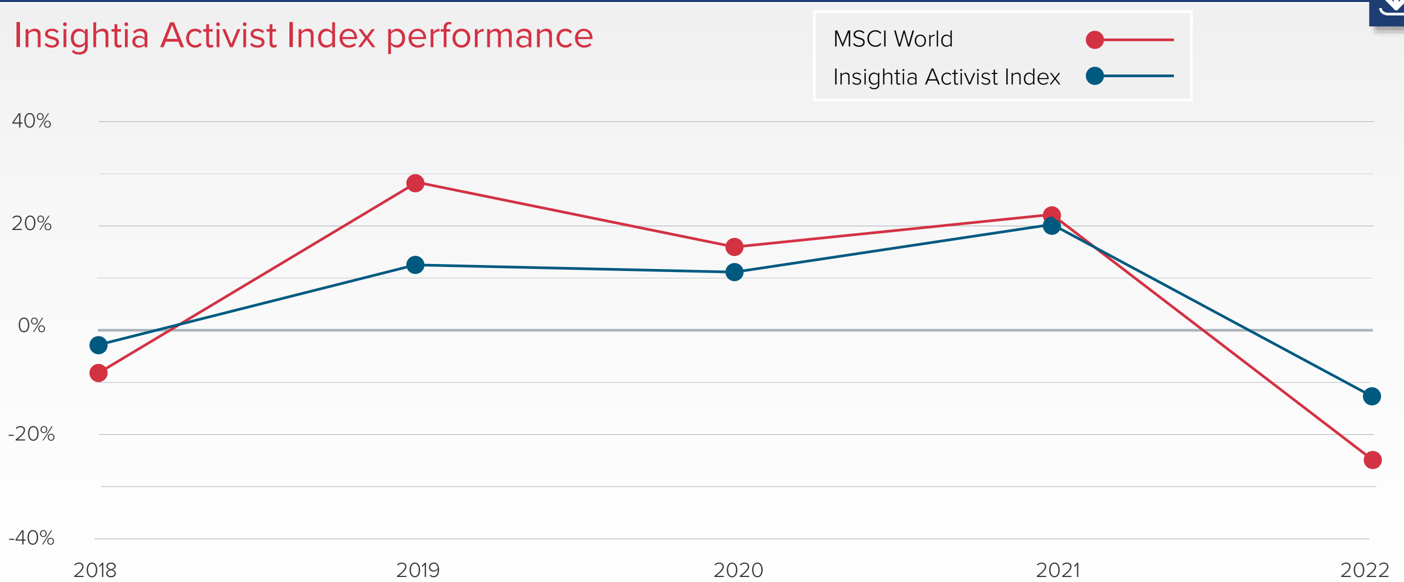
Q4 settlements



Number of global settlements between activists and companies for board representation made in Q4 (October 1 - December 31) by year.

Source: insightia

Insightia Activist Index performance



Performance of the Insightia Activist Index versus the MSCI World Index, by year.

Source: insightia

Regulatory developments

Activists and companies enter 2023 facing a slew of new regulations that will change the way proxy contests are fought, writes Jason Booth.

2022 was a busy year for the Securities and Exchange Commission (SEC), proposing regulations that seek to enhance the director nomination process, climate change reporting, pay-for-performance disclosure, and 13D disclosures.

Perhaps the most significant rule change in 2022 was the mandatory universal proxy card, brought into effect on September 1. As of that date, both sides in a proxy contest are required to use a single proxy card listing all director candidates, both management and activist. Under the ruling, both sides are also required to solicit at least 67% of shareholders.

The new rule means shareholders can mix and match director candidates, increasing scrutiny on the qualities of individual directors. As such, activists may find it easier to secure minority slates.

"Even if activists have stellar board candidates, investors need to believe that change is warranted," Ryan Nebel, vice-chair of Olshan Frome Wolosky's shareholder activism practice group, told Insightia in an interview. "Assuming activists can hit that threshold, universal proxy does open up the playbook and make it far more difficult for companies to shield their weakest directors."

Many also see universal proxy resulting in more settlements in the near term, as companies recognize the potential for activists to secure victory through a shareholder vote. "Companies are concerned, and I think are going to be more willing to settle, at least until they figure things out," James Chadwick, president of alternatives at Ancora Advisors, told Insightia.

"The introduction of universal proxy means shareholders now have the ability to mix and match director candidates, increasing scrutiny on the qualities of individual directors."

Beneficial ownership

One policy less favorably received by activists was the SEC's February proposal regarding 13D disclosures, which intends to cut the deadline for initial 13D holding filings from the current 10

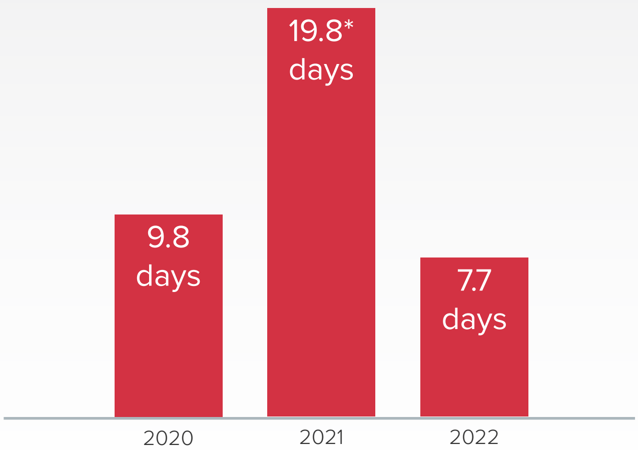
Proxy contest outcomes

Outcome	2018	2019	2020	2021	2022
Dissident win	11	6	9	6	4
Dissident win (partial)	3	0	2	2	1
Dissident withdrew	0	5	1	1	3
Management win	18	16	16	14	16
Meeting postponed	1	0	0	1	0
Settlement	2	7	6	3	2

Outcomes of proxy contents, globally, for activist board representation, by year.

Source: insightia a Diligent brand

13D event date and filing times



Average time difference between event date and filing date of activist 13Ds as tracked by Insightia.
**Includes 13Ds with a difference of 1000 and 797 days*

Source: insightia a Diligent brand

calendar days after an activist exceeded the 5% holding level to five days or fewer. The policy is due to be finalized in spring.

The revised deadline could be considered overly ambitious. In 2022, activists tracked by Insightia took 7.7 days on average to submit their 13Ds after crossing the holding threshold.

Another topic of debate is how disclosure of swaps could be subject to change. Activism behemoths like Carl Icahn and Elliott Management have long used swaps as a means to build a substantial position in a target company without alerting the market to their presence. The question of whether a swap position, which bears no voting rights, should be disclosed as part of an activist position, is already being debated in the courts.

Glenn Davis, director of research at the Council of Institutional Investors (CII), told Insightia that while the 13D disclosure window will almost certainly be shortened to five business days, changes to the swap rule and beneficial ownership will face significant pushback.

A case for change

Going forward, activists will have more ammunition with which to make a case for change, thanks to two new disclosure requirements implemented by the SEC.

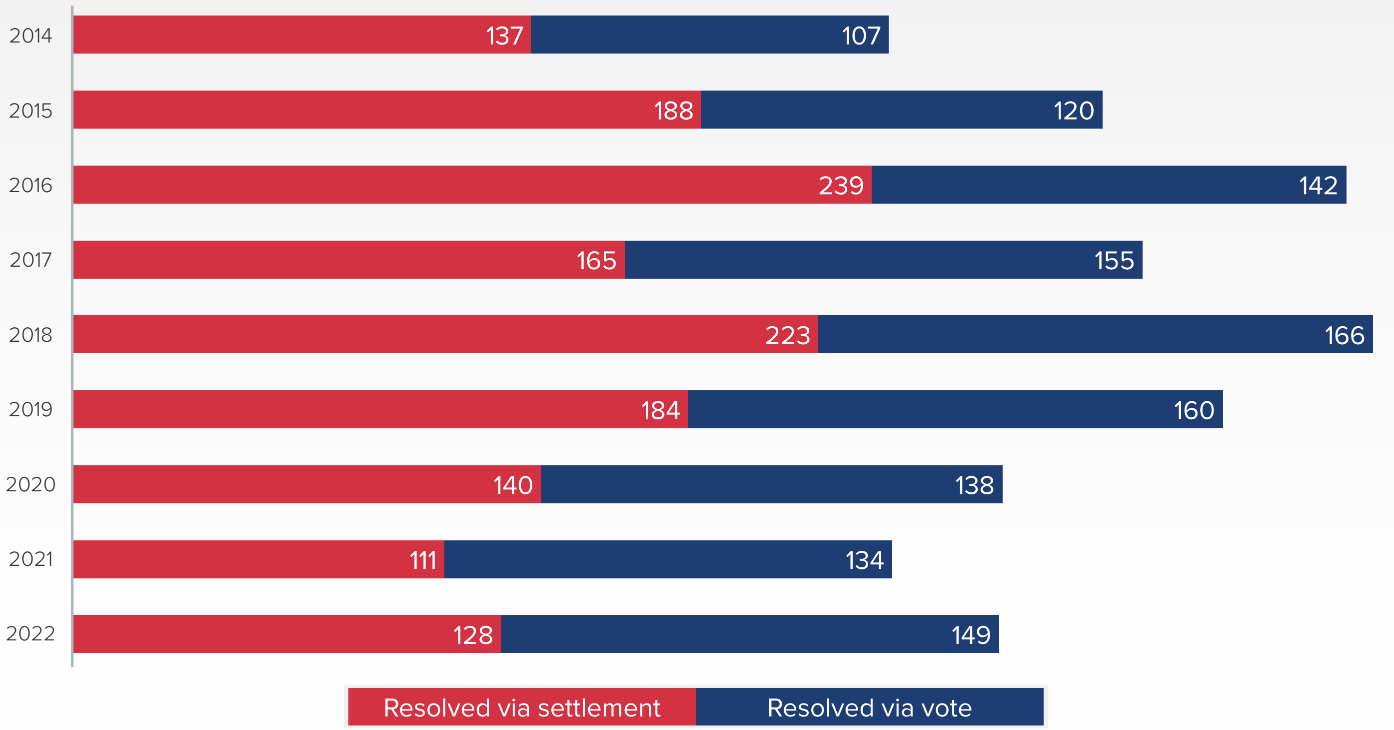
In August, the Commission mandated that companies disclose the amount of compensation "actually paid" to executives over the past five years and a list of metrics on which it is based, including net income, total shareholder return (TSR), and at least one other financial metric.

In March, the regulator also revealed that companies will be expected to enhance their climate-related disclosure in their annual reporting, in line with Task Force for Climate-related Financial Disclosures (TCFD) recommendations, and to disclose their Scope 1 and 2 emissions annually, in absolute terms and in terms of intensity. This policy is due to be finalized in the next few months.

With this wealth of new information about executive pay and a company's climate credentials readily available, activists will have more ammunition to criticize companies and win the favor of institutional investors."

The new Biden-era SEC administration has a much broader view of material risks," Andrea Ranger, shareholder advocate at Green Century Capital Management, told Insightia in an interview. "Companies are now seeing it's best to get on top of these issues rather than giving investors the stiff arm and ignoring us." ■

Resolved board representation demands



Number of resolved activist demands for board representation, globally, by outcome year and method.

Source: insightia a Diligent brand

Directors under the ESG spotlight

Investors turned their attention to directors when looking to signal discontent about a company's ESG practices and oversight, writes Rebecca Sherratt.

Amid a surge in ESG shareholder proposal filings, directors faced renewed pressure to make good on their ESG commitments, with votes against board members responsible for sustainability, diversity, and human capital management becoming widespread.

Globally, average support for director re/election proposals declined for the third consecutive year in 2022, with 4% of directors subject to a vote receiving under 80% support, compared to 3.4% and 3.7% throughout 2020 and 2021, respectively, according to Insightia's *Voting* module.

> *"Expect to see more director revolts in 2023, with both investors and proxy advisers strengthening their ESG policies ahead of the coming season."*

"Voting against directors for ESG shortcomings is arguably both more effective and more accessible than shareholder proposals," Courteney Keatinge, senior director of ESG research at Glass Lewis, told Insightia. "Shareholder resolutions are not commonplace in many markets and, when they are, they are not always perfectly worded, nor do they necessarily address the issues that are most important to investors."

Changing approach

Committee members faced the brunt of investor dissent. Nominating committee chairs and members at Russell 3000 companies won 90.6% and 92.8% average support, respectively, throughout 2022, while compensation committee chairs and members each won 92.6% and 93.4% average support.

With the Securities and Exchange Commission (SEC) mandating in November 2021 that shareholder proposals concerning "material" environmental and social issues would no longer be eligible for exclusion, U.S. issuers were swamped with proposal filings in 2022.

As proposals sought more demanding commitments from companies, many investors opted to instead oppose directors at companies deemed to be falling short in regard to ESG oversight.

"Because of this bulletin, everyone pushed the envelope out," Andrea Ranger, shareholder advocate at Green Century Capital Management, told Insightia. "Investors were no longer filing proposals asking for watered-down reporting, which, in prior years, was the only way to get ESG proposals past the SEC."

ESG shortcomings took centerstage at Guess' April 22 proxy contest, where Legion Partners pushed for a major board refresh, amid co-founder Paul Marciano facing sexual harassment allegations spanning the past four decades. Both Paul and co-founder Maurice Marciano faced 56% opposition, excluding shares held by directors, director nominees, and executive offers, while nominating and governance committee member Anthony Chidoni faced 24% opposition.

Glass Lewis recommended investors withhold their votes for Chidoni, noting the allegations "raise serious questions" regarding the board's ability to effectively oversee its founders.

"The Guess campaign was undeniably successful in highlighting the serious reputational risks that the fashion retailer suffers from," John Ferguson, partner at Saratoga Proxy Consulting, told Insightia in an interview. "Despite the Marciano brothers' high share ownership, the campaign set the wheels in motion to help the board understand that these directors will transition out and there is a need to protect the brand."

At Amazon, Legal & General Investment Management (LGIM) voted against CEO Jeff Bezos and compensation committee members Daniel Huttenlocher and Judith McGrath at the online retailer's May 25 annual meeting, explaining in a bulletin that the trio were considered "accountable for longstanding ESG failings."

Ground rules

Expect to see more director revolts in 2023, with both investors and proxy advisers strengthening their ESG policies ahead of the coming season.

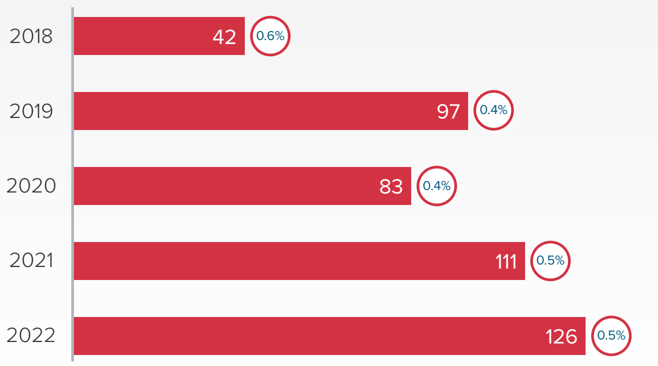
In November, Glass Lewis revealed that, in 2023, it may recommend voting against “responsible” directors at companies where their greenhouse gas emissions “represent a financially material risk” but their disclosures are “absent or significantly lacking.”

“We revised our policy concerning votes against directors several years ago to make sure that boards are effectively overseeing ESG-related matters,” Keatinge said. “Ahead of the 2023 proxy season, we have strengthened this focus for highly-emitting companies to ensure that they are providing the appropriate level of disclosure and oversight to climate-related matters.”

The adviser will also recommend voting against Russell 1000 and S&P/TSX Composite governance committee chairs where a company has failed to provide “explicit disclosure” concerning board oversight of environmental and social issues.

In August, Norges Bank Investment Management (NBIM) similarly warned issuers that directors will be held “accountable” where the board fails to disclose “core information” about their workforces and employee turnover. ■

Director re-election failures



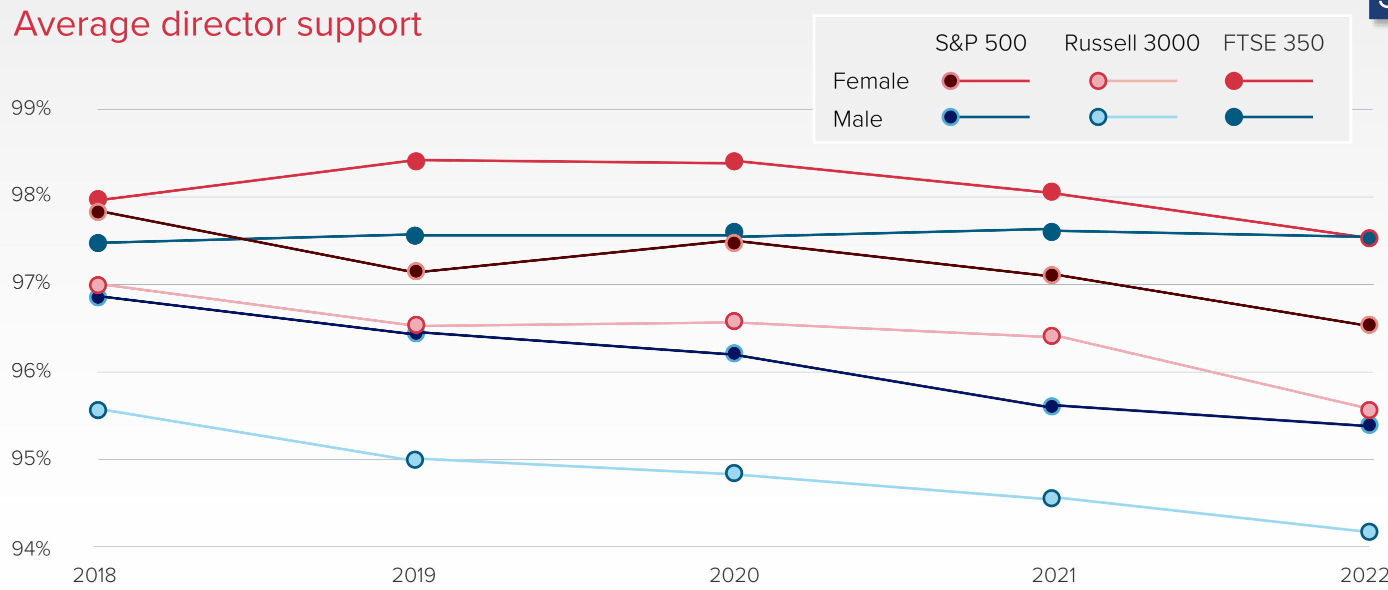
Number of directors at U.S.-based companies receiving less than 50% support, by year. Proportion of all directors subject to a vote circled.

Source: insightia

Selected proxy adviser policy updates

Proxy adviser	Detail
Glass Lewis U.K.	Section added on evaluating the board’s role in overseeing environmental and/or social issues.
Glass Lewis U.K.	New section added on director accountability for climate-related issues, with additional consideration given to companies whose emissions represent a financially material risk.
Glass Lewis U.S.	Section added regarding board accountability for climate-related issues.
Glass Lewis Continental Europe	Section added that outlines Glass Lewis’ beliefs when it comes to director accountability for climate-related issues.
Glass Lewis ESG Initiatives	Section added regarding board accountability for climate-related issues.
ISS	Added policy regarding climate accountability and both management and shareholder “say on climate” proposals.

Average director support



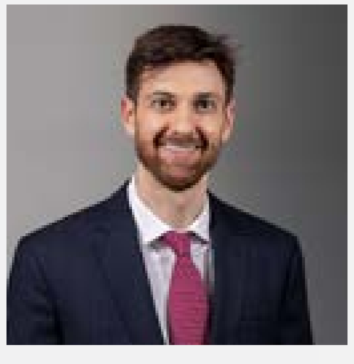
Average support for S&P 500, Russell 3000, and FTSE 350 directors, by year and gender.

Source: insightia

The new regime

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

"Every director needs to really scrutinize what bylaw amendments involve. Are they chilling shareholder engagement to an excessive extent?"



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What have we learned from the first universal proxy fights and how might the new regime impact the future of activism?

Elizabeth Gonzalez-Sussman (EG): The changes universal proxy brought on have been interesting to observe. We have a new voting regime where both incumbent and dissident directors will appear on one proxy card, assuming that the company recognizes an activist's nominations. One situation has already played out where a company took the position that the activist's nominations were invalid, so ran one card that didn't include the activist's nominations.

If we look at the first successful campaign to use universal proxy, our client Land & Buildings was able to secure one director appointment on AIMCo's board. This suggests what many predicted; that it may be easier to get minority representation, enabling shareholders to pick and choose the best board composition.

Under this new regime, I predict there will be more settlement offers earlier in a campaign's lifespan. Activists will have to decide whether to agree to a settlement for one board seat or whether it is worth taking their chances and running a full contest, which could potentially result in winning just one or two board seats, if not several more.

One consideration making campaigns more challenging for activists is that it's becoming increasingly difficult to secure that great nominee, and there are several reasons for this. Not everyone wants to serve on an activist's slate; there is no guarantee of success, and it is unpredictable how dissident nominees may be targeted by a company. One must also consider the many boxes a nominee has to check in relation to C-suite experience, industry experience, etc. Planning is crucial ahead of this new universal proxy regime.

Ryan Nebel (RN): It is important to remember that the activist still has to establish a case for change. Even if an activist has stellar board candidates, shareholders need to believe that change is warranted. Assuming the activist can hit that threshold, universal proxy does open up the playbook and make it far more difficult for companies to shield their weakest directors. On the flip side, boards could be encouraged to unilaterally refresh, seeking to take the wind out of an activist's sails ahead of the shareholder meeting.

More companies adopted aggressive defense tactics last year, including poison pills and burdensome bylaw amendments. Why was this and will this trend continue into 2023?

RN: The surge in poison pills was largely due to the number of companies that experienced depressed valuations in 2022. As a result, many companies recognized that this could make them vulnerable to a potential hostile bid or other activist engagement, and took action to attempt to mitigate the perceived risk.

With respect to bylaw amendments, in 2022 we saw several companies adopt aggressive changes to their advance notice provisions under the guise of conforming to the new universal proxy rules. Instead, these amendments often overhauled the company's nominating requirements, going far beyond any technical changes that may be required to account for the new rules. In fact, some new requirements seek invasive information on dissident shareholders and nominees that are entirely irrelevant to a candidate's qualifications or ability to serve on the board, which we find concerning. Until Masimo's bylaws, which are currently being contested in court, are struck down or abandoned, there is a potential risk that additional companies could seek to enact similar shareholder-unfriendly provisions. Directors should think twice before adopting any such changes though because it ultimately amounts to a thinly-veiled attempt to disenfranchise shareholders.

EG: Bylaw amendments are tricky to navigate because, in some cases, not all shareholders fully digest the extent to which these changes are impacting investors' abilities to hold boards accountable.

We penned an open letter to directors last year to be on the lookout for certain bylaw changes that are adopted under the guise of aligning with new universal proxy rules but are, in fact, being thrown in there as a barrier to entry for activists and making the cost of nominating skyrocket. This can especially disenfranchise shareholders at small- and micro-cap companies that don't have the same kinds of governance standards. Every director needs to really scrutinize what these bylaw amendments involve. Are they chilling shareholder engagement to an excessive extent?

How did activists' priorities and engagements change in 2022?

RN: There were, of course, more and more ESG-focused campaigns entering the fray last year. Looking at more traditional activists, we saw an increase in campaigns geared towards operational and management changes. We ran several campaigns focused on CEO and leadership changes, and this likely contributed to why we didn't see as many early-stage settlements in the first half of the year, prior to the introduction of the universal proxy. We also had quite a few clients launch control fights last year. Many believe that control fights may become even more difficult to win under the universal proxy regime, so several activists took one last bite at the apple in the first half of 2022 with majority slates.

EG: In the control fights we were involved with, there was certainly a motivation on the part of the activists to make sure they made their viewpoints and goals clear before financial markets began to chill. Everyone knew that the Federal Reserve would increase interest rates multiple times last year so there was a race to complete any strategic initiatives before that happened. Nominating control slates were often the tactic activists employed to hold companies' feet to the fire. Going forward, I think we will see fewer control slates, given where markets are and the impact of universal proxy.

Given rising interest rates and market volatility, could M&A and capital allocation activism see a significant shake-up in 2023?

EG: Rising interest rates can certainly impact the ability of buyers to finance an acquisition. A company's liquidity also suffers in the event of rising interest rates, making a company more distressed. What I am seeing is that more companies are focusing more on improving their operations to weather the storm, so to speak. Issuers may be unable to sell their struggling subsidiaries or holdings but pivot their focus on how to best position the company to better perform. Companies will likely refocus on holding management to account for underperformance, as well as spend more time analyzing cost-cutting measures and capital allocation. ■

Tough times for ESG activism

ESG activism had a rough ride in 2022, thanks in part to market volatility and the energy sector reporting record profits, writes Rebecca Sherratt.

Following the success of Engine No. 1's sustainability-fueled campaign at ExxonMobil in 2021, a surge of budding ESG activists emerged last year, conscious that implementing environmental and social considerations into their campaigns would help drive support from institutional investors.

And yet, despite activists' best efforts, 2022 proved to be a challenging year for ESG activism, with green stocks underperforming as oil and gas prices soared.

The number of environmental demands made publicly in 2022 globally increased by 81% to 292, compared to 161 throughout 2021. Despite this, only 11.5% of environmental demands were at least partially successful, compared to 25.8% a year prior.

Declining success rates were partly due to fewer shareholder proposals winning support, amid concerns that requests became overly prescriptive. This was especially evident in the U.S., thanks to regulatory changes to the Rule 14a-8 no-action process. One such proposal asking ConocoPhillips to report on its emissions reduction targets won 41.7% support at the energy major's May annual meeting, a significant decline compared to the 59.3% support an identical proposal won one year prior.

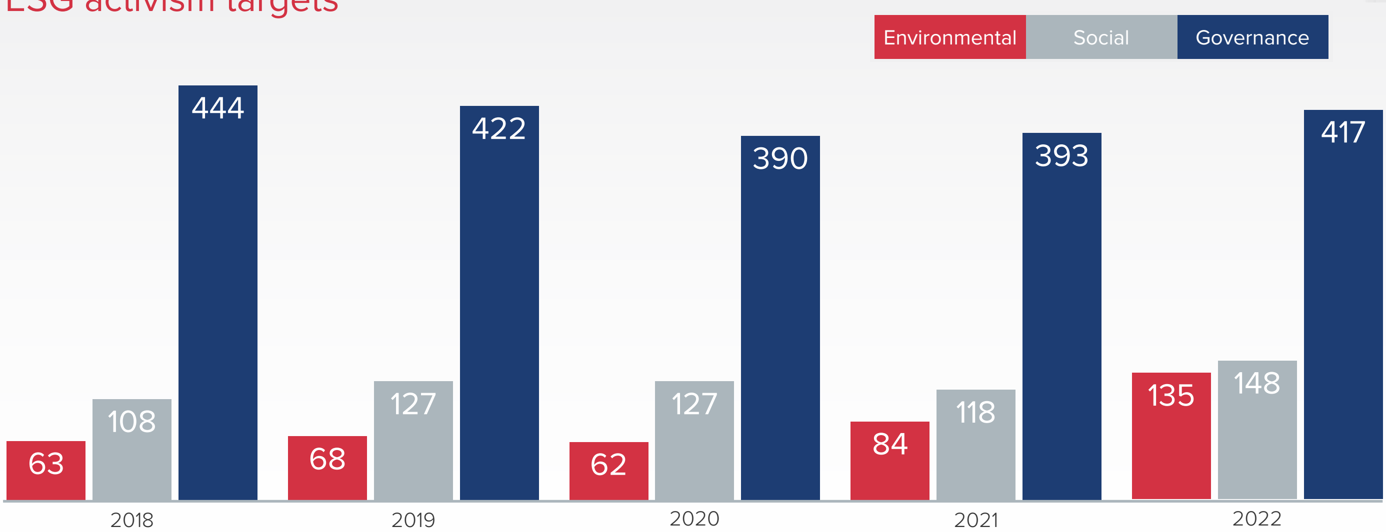
Financials take precedence

Amid fears of a recession and rising interest rates, ESG activist campaigns that failed to make a compelling link between a company's ESG credentials and a company's financial performance were largely doomed to fail.

"It may be easier to support ESG activism when the market is flying, but it becomes tougher to do so when companies have to make difficult decisions about where to focus resources."

"It may be easier to support ESG activism when the market is flying, but it becomes tougher to do so when companies have to make difficult decisions about where to focus resources," Gabrielle Wolf, director at Innisfree M&A, told Insightia in an interview.

ESG activism targets



Number of companies publicly subjected to environmental-, social-, and governance-related demands globally, by year.

Source: insightia a Diligent brand

A case in point is Carl Icahn's animal welfare-fueled campaigns at McDonald's and Kroger. One investor that wished to remain anonymous told Insightia that these campaigns failed because the activist "failed to make any mention" of how improving the welfare of pigs in each company's pork supply chains would foster long-term shareholder value.

On the opposite end of the spectrum, Elliott Management secured a spot on Suncor's board after persuading investors that overhauling the energy firm's employee safety culture was "critical" to helping the company deliver on its promised $2-billion cash flow improvement plan.

Looking a gift horse in the mouth

The utilities and energy sectors continued to bear the brunt of environmental-related demands last year, driven by the global energy crisis incurred by Russia's invasion of Ukraine. Despite this, many high-profile campaigns failed to yield results.

Bluebell Capital Partners' push for Glencore to demerge its coal business and replace environmental committee member Peter Coates, in order to ensure the Swiss miner remains investible for shareholders "who place sustainability at the heart of their investment process," was unsuccessful, despite facing support from various environmental advocacy groups. Glencore's climate action plan faced a meager 23.7% opposition at its April annual meeting, while Coates faced just 3.8% opposition.

It was a similar story at Shell, which faced calls from Odey Asset Management to commission an independent audit of its carbon emissions. Despite Odey's concerns, the U.K. oil major's climate plan faced just 20% opposition at its May annual meeting. Just last month, Bluebell also set its sights on BlackRock, calling for the fund manager to replace its CEO and launch a strategic review of its ESG investment policies.

ESG activism may get a new lease of life in 2023, with the universal proxy making it easier for investors of all stripes to nominate ESG-savvy directors onto boards. Proxy advisers Glass Lewis and Institutional Shareholder Services (ISS) noted they are likely to be supportive of activists launching campaigns addressing multiple issues in 2023, which may influence activists to adopt an ESG lens in their campaigns.

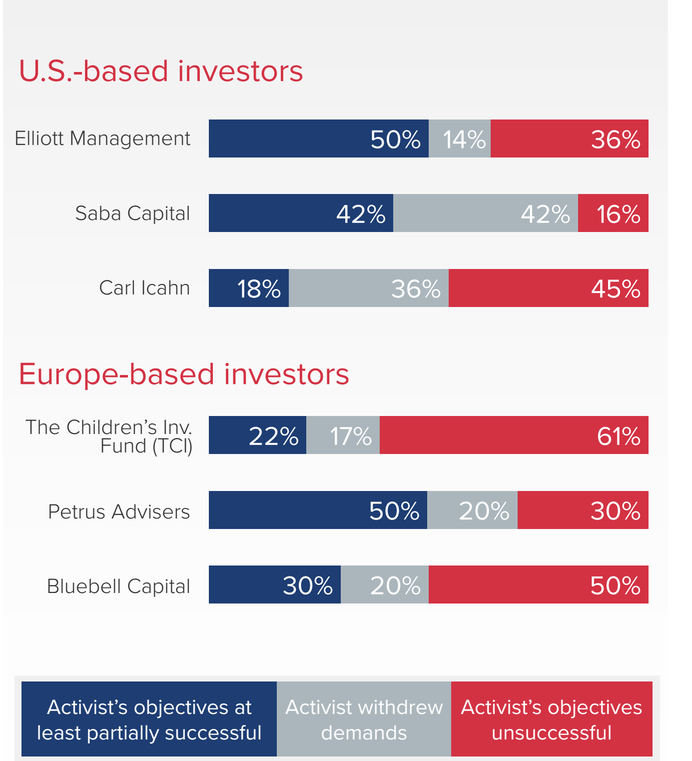
"ESG will be a theme in 2023, given the increased focus in the market generally, but probably not the driving reason for any fight," Michael Verrechia, managing director of Morrow Sodali's M&A and activism advisory group, told Insightia in an email.■

Prolific ESG activists

Top primary- or partial-focused activist investors by the number of companies publicly subjected to environmental-, social-, and governance-related activist demands between January 1, 2018, and December 31, 2022.

Source: insightia a Diligent brand

ESG activist success



Outcome of ESG-related demands made by the primary- or partial-focused activist investors by the number of companies publicly subjected to environmental-, social-, and governance-related activist demands between January 1, 2018, and December 31, 2022.
Note: Rounding may lead to summation errors.

Source: insightia a Diligent brand

The activist top 10

Each year, Insightia creates a ranking of the most influential activists over the past year, based on the quantity, size, and performance of their activist investments, comprehensively derived from data on the Insightia One platform.

The following categories have been used to create a points-based ranking of each activist for this year's list: number of companies publicly subjected to activist demands, average market capitalization of targeted companies, success of public demands; average 2022 total follower return*, and the depth of news coverage on the activist on Insightia One in 2022. To qualify, an investor must regularly employ an activist strategy and have publicly targeted three or more companies in 2022.

**Total follower returns in this article are calculated using a starting price from the close on January 3, 2022, for investments held prior to this date. The start price of investments first publicly disclosed during 2022 are measured from the closing price on the disclosure date. The end price is the closing price from December 30, 2022, for investments currently held at this time. The end price for investments publicly disclosed as being exited in 2022 are measured using the closing price on the disclosure date. The data includes investments with ongoing campaigns during 2022 only.*

1. Elliott Management

Companies publicly subjected to demands in 2022: 9
Average 2022 total follower return: -2.30%

Average target market cap: $24.3B
Insightia One news stories: 95

Elliott Management once again takes the top spot in 2022, boasting an especially successful year. Eight of its nine campaigns publicly launched last year were either successful or partially successful, with the one remaining still ongoing.

"We have to be prepared for any and all market moves because we are committed to growing our clients' capital, regardless of the market environment," Steven Barg, global head of engagement at Elliott, told Insightia in an interview.

Most recently, Elliott Senior Portfolio Manager Marc Steinberg joined Pinterest's board after a monthslong "collaborative dialogue" with the activist firm, just four months after Elliott disclosed its stake and shares in the social media giant climbed more than 20%. This feat is made all the more impressive, considering the social media giant's dual-class share structure.

Elliott expressed to Insightia its eagerness to focus on diversifying its own internal talent, which was evident throughout 2022. Elliott colleagues also joined the boards of Cardinal Health and Toshiba earlier this year, following engagements with both issuers.

Equally as impressive, seven of the 12 directors appointed by Elliott in 2022 were diverse candidates, with women and/or underrepresented minorities winning board seats at companies such as NiSource, Toshiba, and Duke Energy.

The $55-billion fund manager also appointed three directors to Suncor's board in a campaign that highlighted the importance of robust employee safety measures, while also pushing SSE to spin off its renewables unit to help establish the company's position as the U.K.'s "renewables champion."

"Being a multi-strategy firm is very advantageous as it allows us to allocate our assets to the best opportunities, irrespective of asset class or industry," Barg told Insightia. "In 2023, we want to ensure that our processes continue to be robust, our diligence superb, and that we continue to provide what our clients expect from us."

"We have to be prepared for any and all market moves because we are committed to growing our clients' capital, regardless of the market environment."

The activist top 10

2. Carl Icahn

Companies publicly subjected to demands in 2022: 7
Average 2022 total follower return: -3.83%
Average target market cap: $39.7B
Insightia One news stories: 61

Carl Icahn ranked among the most active shareholder activists in the world last year, although his push into the ESG space failed to bear fruit.

Icahn's clearest win was at Southwest Gas, a campaign initiated in 2021, but concluded in May when he reached a settlement deal with the U.S. utility firm to name up to four directors and replace the company's Chief Executive John Hester, a central figure in the activist campaign. In December, Southwest Gas announced it would shed its pipeline business and spin off its construction arm, two operations Icahn marked a year ago for divestment.

The veteran activist also gained two seats at Crown Holdings as part of a settlement deal that came just a month after the activist first threatened a potential proxy fight with the beverage-can maker. To further add to Icahn's reputation as a stock picker, he made estimated profits in excess of $250 million after Tesla CEO Elon Musk revived his proposal to acquire social media company Twitter.

Icahn had far less luck, however, with his campaign to force McDonald's to live up to a decade-old promise to improve the treatment of pigs raised by its pork suppliers. In May, McDonald's shareholders voted to reelect all 12 incumbent directors to the board, rejecting two directors put forward by Icahn. Later that month, Icahn dropped a similar proxy fight focused on pig welfare at U.S. supermarket giant Kroger.

Following the losses, Icahn said the stock market performance of the two companies in the run-up to the campaign had made it hard for other investors to back his cause. Others noted that Icahn owning just 200 McDonald's shares and 100 Kroger shares raised questions about the activists' commitment.

3. Saba Capital Management

Companies publicly subjected to demands in 2022: 8
Average 2022 total follower return: 8.67%
Average target market cap: $284.4M
Insightia One news stories: 22

Saba Capital Management had a productive 2022, subjecting no fewer than eight issuers to activist demands and continuing to target funds trading at a discount to their net asset value (NAV).

One of the most memorable campaigns for Boaz Weinstein's hedge fund was that involving Salient Midstream & MLP Fund. The closed-end fund traded at a discount to NAV of -19% on November 1, 2021, when the activist filed its initial 13D and, after months of constructive engagement with the fund's board, an agreement was arrived at for its reorganization into a lower fee open-ended fund.

"Our agreement included the unique creation of a 'Saba Special Distribution' paid out to all shareholders by the fund's adviser," Paul Kazarian, Saba Capital Management partner and portfolio manager, told Insightia in an interview. "This meant that shareholders who chose to exit were able to do so at a premium to NAV."

Other successful Saba campaigns included a push for board representation targeting nine seats at closed-end fund Delaware Investments National Municipal Income Fund. The activist later negotiated a standstill agreement, under which the fund agreed to launch a cash tender offer for up to 50% of its shares.

Saba also targeted three ClearBridge funds in the period. In September, it nearly doubled its stake in ClearBridge Energy Midstream Opportunity Fund holding to 10% and said it may also push for changes, including a potential liquidation of the closed-end fund. In October, Saba similarly disclosed an over 5% stake in ClearBridge MLP and Midstream Fund, declaring its plan to speak with management about why the fund's common stock is trading at a discount to its NAV.

Looking ahead to 2023, Saba told Insightia it will continue to target closed-end fund discounts, which it feels are currently amongst the widest it has seen in its history. "With over $50 billion in closed-end funds trading at discount greater than -15% globally, we expect 2023 to be one of the busiest years for closed-end fund activism on record," predicted Kazarian.

> *"We expect 2023 to be one of the busiest years for closed-end fund activism on record."*

The activist top 10

4. Ancora Advisors

Companies publicly subjected to demands in 2022: 10
Average 2022 total follower return: -14.65%
Average target market cap: $4.2B
Insightia One news stories: 47

Ancora Advisors had another busy year, though the typically pugnacious activist gained the most through negotiated settlements.

In February, Ampco-Pittsburgh agreed to appoint four new directors, including Ancora's chairman Frederick DiSanto. A month later, shipping and logistics company C.H. Robinson Worldwide agreed to appoint two new directors and set up a capital allocation and planning committee.

The activist gained two seats at Muller Water in October and, most recently, packaging company Berry Global agreed to name three new board directors, including an activist nominee, and create a capital allocation committee. Jim Chadwick, portfolio manager at Ancora, argued that the uncertainty surrounding universal proxy rules may have made companies more willing to settle.

Those stock market gains, which also benefitted Ancora, softened the blow of losing the only campaign the activist fought all the way to a vote. Chadwick also felt that losing a vote was worth the effort, stating: "the importance of those contests, whether you win or lose them, is that people on the other side know that we're going to follow through on the threat, we're not going to just walk away."

Chadwick described 2022 as a difficult year to make money, though given his firm's active hedging strategy it avoided significant losses. Even so, the dislocation created by the downturn has created new opportunities for Ancora and others. "There's a lot more interesting names out there just based on stocks trading down as much as they have," he said.

5. Nippon Active Value Fund

Companies publicly subjected to demands in 2022: 13
Average 2022 total follower return: 7.42%
Average target market cap: $335.0M
Insightia One news stories: 7

Nippon Active Value Fund was one of the most prolific activists in Asia during 2022, running 13 campaigns throughout the year targeting various Japanese issuers.

The activist's focus remained mostly on remuneration and share repurchases, making 26 demands of this kind throughout 2022. The $157-million fund manager notably reached a settlement with Mitsuboshi Belting that saw the Japanese manufacturer implement a share repurchase in May.

Nippon also played a fundamental role in pushing Japanese building materials company Bunka Shutter to implement a 7.1-billion yen ($52 million) share buyback plan and introduce a transfer-restricted stock-based compensation system. However, Bunka's shareholders rejected the proposals at the company's June 21 annual meeting.

Nippon Fine Chemical, Konishi, Nihon Denkei, and Soda Nikka Co. also rank among the companies to face pressure to return cash to shareholders in 2022.

"2022 was a big year for Nippon," Paul ffolkes Davis, chairman of Nippon investment adviser Rising Sun Management, told Insightia in an interview. "We signed a memorandum of understanding with Dalton Investments so that we can leverage some extra firepower from them for our own portfolio, strengthening our position greatly. We also recently launched a tender offer to acquire a further 20% of Japanese ink and resin manufacturer T&K Toka, adding to our existing 22% stake."

6. Crystal Amber

Companies publicly subjected to demands in 2022: 3
Average 2022 total follower return: 27.93%
Average target market cap: $139.5M
Insightia One news stories: 12

Guernsey-based Crystal Amber Fund made public demands at three companies last year, intent on increasing the value of its investments.

Crystal Amber Managing Partner Richard Berstein told Insightia that the hedge fund's campaign at London-listed oil and gas company Hurricane Energy, where it received a board seat, was it's most important.

"Its share price has doubled over the year and the company now has well over $100 million of net cash," said Berstein. "Hurricane is generating strong cash flows for at least the next couple of years and the company has a takeover offer, and subsequently multiple expressions of interest."

Another one of its 2022 target companies was technology incubator Allied Minds, which was delisted from the London Stock Exchange and saw its chairman step down at the behest of Crystal Amber. "We now have one of our team as one of the directors," Bernstein said. "The company recently delisted from the market because the costs of remaining listed were prohibitive relative to the scale of the company. So, again, we've removed the impediment."

Crystal Amber was also active at U.K. banknote manufacturer De La Rue, criticizing the board over the company's two profit warnings last year and calling for a sales process.

Going forward, Bernstein predicts the current investment landscape will prove to be fertile ground for activists, due to higher interest rates resulting in more distressed situations. The current market will serve to benefit activists focusing on the "intrinsic value of business."

The activist top 10

7. ValueAct Capital Partners

Companies publicly subjected to demands in 2022: 4
Average 2022 total follower return: -0.97%
Average target market cap: $29.0B
Insightia One news stories: 20

ValueAct Capital Partners boasted an impressive track record in 2022, with all four of its resolved campaigns being at least partially successful.

Among its most notable campaigns, the $16-billion hedge fund successfully pushed Seven & i Holdings to revitalize its board and address longstanding independence issues, as well as place department store Sogo and Seibu up for sale to ensure the core Japanese grocery store chain avoids "drifting into mediocrity." Softbank-controlled investment firm Fortress Investment Group is expected to pay 200 billion yen ($1.38 billion) for the department store chain.

ValueAct also navigated the successful appointment of two of its own partners to Insight Enterprises' and Fiserv's boards earlier this year, after claiming that both U.S. technology companies could benefit from "transforming themselves" to maximize shareholder long-term value.

"The theme of incumbent technology companies transforming themselves is not new to ValueAct," the fund manager said in a press release, noting similar successful investments it made in Adobe, Microsoft, and Seagate.

ValueAct currently has its sights set on The New York Times Co., having revealed a 6.7% stake in the media group back in August and allegedly pushing the company to more aggressively market its subscriber-only content to improve digital sales.

8. Jana Partners

Companies publicly subjected to demands in 2022: 4
Average 2022 total follower return: 0.66%
Average target market cap: $4.8B
Insightia One news stories: 40

Jana Partners' year was bookended by its campaign at Zendesk, with 91% of shareholders backing the activist's call to vote down the company's merger with Momentive Global in February, followed by a sale of Zendesk ten months later. Another target from last year, Treehouse Foods, sold its meal preparation business following a settlement that gave Jana a board seat, using seller financing to beat the temporarily dampened appetite for M&A.

Jana Co-portfolio Manager Scott Ostfeld feels that dealmaking will still be part of the activist toolkit in 2023. "Strategic M&A is alive, and growth company take-privates are alive because they can call on alternative sources of capital," he told Insightia in an interview. "The traditional leveraged buyout (LBO) market will likely return in 2023... Firms sitting on the side-lines with time-limited capital should accelerate take-private activity when traditional lenders come back to the market."

Jana already has some new targets lined up, enlisting former sports stars Dwayne Wade and CC Sabathia as advisers for its campaign at Freshpet and helping FIS conduct a board refresh in December.

Ostfeld, Jana's co-portfolio manager, thinks that despite the firm's busy year, the market remains ripe in 2023. "If the market is performing poorly, there is a lot more opportunity for activism," he said.

9. Engine Capital

Companies publicly subjected to demands in 2022: 6
Average 2022 total follower return: 3.40%
Average target market cap: $2.6B
Insightia One news stories: 16

Engine Capital stepped up its activism activity in 2022, running three times as many public campaigns compared to a year prior, something its founder Arnaud Ajdler puts down to being opportunistic.

"We do not typically invest in banking, or commodity businesses like gold or oil and gas, but as long as we understand the business, it generates free cash flow, and we think it is a good business, we are comfortable investing," Ajdler said in an interview with Insightia.

Engine's most high-profile campaign in 2022 was no doubt its push for board representation at Blucora. In February, Engine called for the technology company, also a former target of Ancora Advisors, to address its "exceedingly poor" share price performance and criticized its bloated overheads.

Engine also took issue with the fact that Blucora's two divisions, Avantax and TaxAct, had no synergies and that the company was trading at a discount to the sum of its parts. Ajdler told Insightia that the positive reaction to the company's share price following the November sale of TaxAct ultimately proved this point.

Engine also saw success in a campaign at American Outdoor, with partner Bradley Favreau joining the board as part of a cooperation agreement in August. Despite withdrawing its director slate at SciPlay, Engine has also remained closely involved with the gaming company and submitted a recommendation in October for it to merge with parent company Light & Wonder.

10. Starboard Value

Companies publicly subjected to demands in 2022: 5
Average 2022 total follower return: -20.12%
Average target market cap: $14.5B
Insightia One news stories: 51

Jeff Smith's Starboard Value is primed for a busy 2023, unveiling four new technology sector investments in October, including a call for Salesforce to improve its operational performance.

The activist said at the time that economic anxiety had caused the market to switch from putting growth at a premium to focusing on margin expansion, which created fertile ground in the sector. Since then, Salesforce has been rocked by a series of leadership changes, leaving co-founder Marc Benioff carrying the burden of improving margins.

Starboard was one of the few established activists to continue waging proxy fights over the last three years, albeit losing twice at Box in 2020 and 2021, and once at Huntsman Corp. earlier this year. Despite the defeats, both companies outperformed the S&P 500 index during Starboard's holding periods.

The activist also gained board seats through settlements at Green Dot, Humana, LivePerson, and Mercury Systems, rounding out another productive year. ■

Unlocking value

An interview with Michael Verrechia, managing director of Morrow Sodali's M&A and activism advisory group.

"We may see ESG activists or gadflies take advantage of the lower campaign costs available with the universal proxy card to create pressure for a self-interested agenda."

Michael Verrechia
m.verrechia@morrowsodali.com

What shareholder activism trends, if any, do you think could carry over from 2022 into the new year?

Over the last few years, we've seen an uptick in proxy contests from "first-time" and less established activists, or investors with smaller campaigns under their belt who then move on to bigger targets. With the universal proxy card now in effect, we expect that trend to continue. In situations where the target company is closely held, an activist investor could conduct an entry-level campaign for a reduced cost to create pressure for change where they otherwise would not.

Additionally, we expect we will continue to see opposition to M&A transactions on both sides of the deal. While those situations usually do not materialize into formal proxy contests, public opposition from a credible holder can create tremendous risk to the deal and concern at the ballot box.

How might the universal proxy card impact battles for board control?

With the ability to easily "split" your vote for nominees on both slates, we could see an increased level of support for some subsets of dissident nominees. Most large institutions and proxy advisory firms will continue to evaluate whether the activist makes a compelling case that change is necessary before supporting even a well-qualified dissident nominee. However, there are institutional holders and hedge funds that may feel more comfortable voting for some well-qualified nominees on the dissident slate even when they believe overall support for the management team is warranted.

The perceived unintended consequences of voting a dissident card under the old proxy voting system no longer exist and the ability to freely pick and choose nominees could result in a willingness to support fresh voices in the boardroom. We may also see ESG activists or gadflies take advantage of the lower campaign costs available with the universal proxy card to create pressure for a self-interested agenda.

Would all activist campaigns benefit from an ESG component now?

The spotlight on a company's corporate governance practices has long been a part of all activism campaigns. While ESG initiatives are certainly front and center for many governance-minded voters, a successful activism campaign will continue to be driven by an activist's ability to tie the initiative to unlocking value. While activist investors will certainly continue to highlight poor ESG practices when it benefits their campaign, the success of pure ESG campaigns to date has been mixed, and going forward will be dependent on the activist's ability to make that link.

How might M&A activism evolve in the new year?

Over the last few years, we've seen a significant level of high-profile deal activism on both the buy- and sell-side. As a result, we are always prepared for deal opposition even on seemingly run-of-the-mill friendly M&A transactions. While the focus of the activism is sometimes to block a deal, the activist's goal is generally to get revised terms where shareholders make more money. That said, deal opposition can take many forms beyond a formal proxy contest or vote no campaign. As a result, companies involved in M&A transactions should work together to create a detailed engagement plan. ■

The defense line

Amid a surge of post-COVID activism, an industry-wide debate has emerged on how aggressively companies should defend themselves against dissident investors, writes Antoinette Giblin.

According to Insightia's *Activism* module, there's been an almost 11% annual increase in the volume of U.S.-headquartered issuers publicly targeted by an activist campaign, with 511 recorded in 2022, compared to 462 in 2021.

Activist campaigns, plus market volatility and the introduction of the mandatory universal proxy card, have companies racing to implement poison pills or change their bylaws. But that has created a backlash that has sent some of the more extreme examples to court.

Armoring up

The type of defense adopted by an activist target is often led by the nature of the anticipated demands. Most recently, companies have implemented poison pills and staggered boards in a bid to fend off creeping control, proxy fights, or unsolicited takeover bids.

Six poison pills were adopted by Russell 3000 companies in 2022 in response to or following a takeover bid. Ryan Nebel, Partner at Olshan Frome Wolosky, told Insightia that adopting a pill doesn't mean a transaction cannot and won't happen. "They can stop a hostile acquisition in its tracks, but it doesn't entirely insulate the company because there are other tools available if shareholders are in support of an acquisition offer."

"Poison pills are not the only tools companies are using to mitigate activist intervention, with some opting to amend their bylaws in ways which could be considered aggressively anti-activist."

In total, 14 companies adopted a poison pill in 2022 without any obvious threat of a takeover bid. This included asset manager WisdomTree, which adopted a rights plan in March and two months later expanded its board, giving activists ETFS Capital and Lion Point Capital two seats in a settlement agreement hailed by its chairman as a "positive development." A rights plan was also relied upon by six Russell 3000 companies in 2022,

Adopted poison pills

Number of poison pills adopted by companies in the Russell 3000 index, by year.

Source: insightia a Diligent brand

after an activist hinted at a possible evaluation of strategic alternatives.

“We think [poison pills] are a massive entrenchment tool that boards use when, generally, they’re trying to perpetuate their own existence,” Legion Partners CEO Chris Kiper told Insightia, adding that he feels every pill should go to a shareholder vote on a routine basis, a position also recommended by proxy advisers ISS and Glass Lewis.

This view is echoed by shareholder advocate James McRitchie, who told Insightia that if a board does unilaterally adopt a poison pill, it should be voted on by shareholders at their next meeting within two months of adoption.

The chilling effect

Poison pills are not the only tools companies are using to mitigate activist intervention, with some opting to amend their bylaws in ways which could be considered aggressively anti-activist. Masimo Corp.’s recent bylaw amendments regarding adding new nomination requirements, while in the face of a looming proxy contest led by Politan, caused quite a stir, with concerns they ran the risk of undermining reasonable and appropriate bylaws.

The amendments in question, which were scrapped in early February, would have required Politan to disclose confidential information about the fund’s limited partners, any nominations it has made or had planned for the previous three years or expects to target in the next 12 months, and the names of any stockholders who have expressed any support for the nominations.

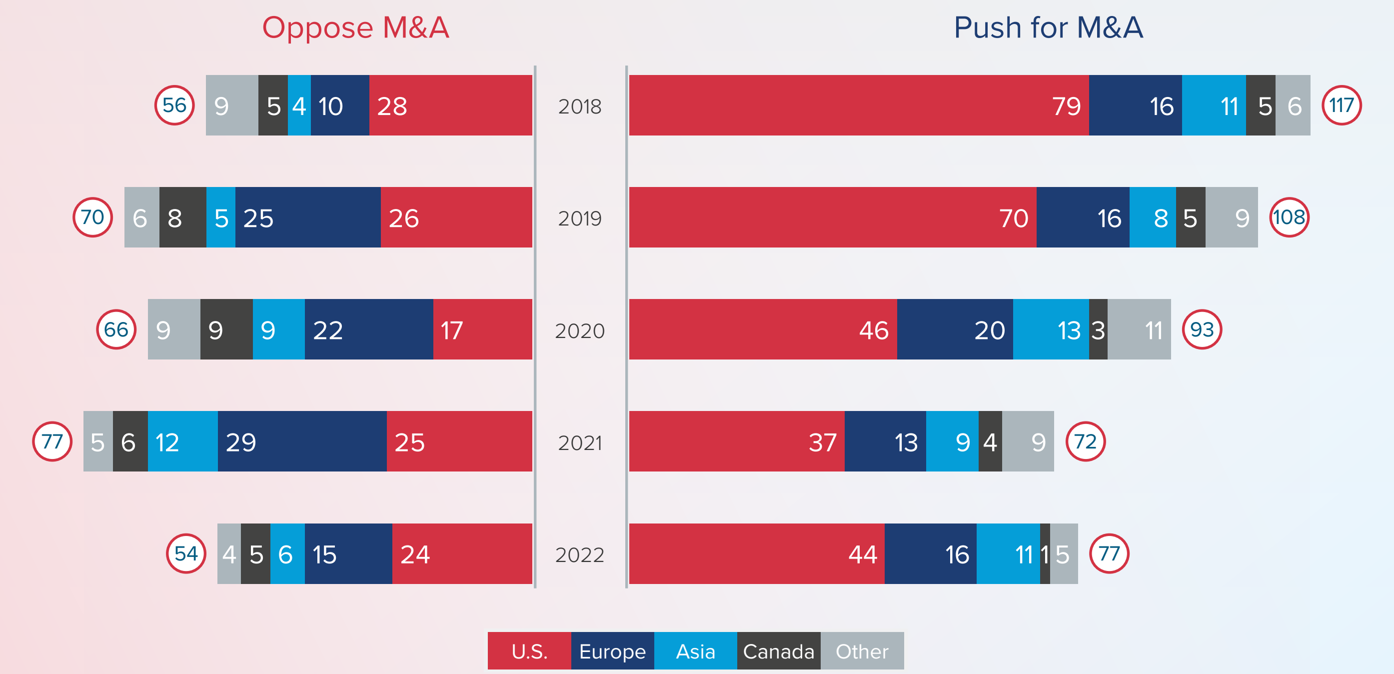
A lawsuit led by Quentin Koffey’s activist fund asked Delaware Chancery Court to throw out the controversial bylaw amendments, describing them as “unprecedented among publicly-traded companies.”

Nebel of Olshan Frome Wolosky told Insightia that while advanced notice provisions can serve a legitimate purpose, such as ensuring shareholders have relevant information, they have over the years evolved into “onerous disclosure requirements” that seek information well beyond what is relevant. “Now, with Masimo, you see a company weaponize advance notice provisions in a blatant attempt to stymie activism and entrench incumbent directors,” he said.

Future demands

As M&A activity remains relatively subdued due to the macro environment, rising interest rates, and a lack of available debt funding, Nebel told Insightia that boards should consider a possible rise in demands for a spinoff or break-up rather than a sale, when deciding on their defensive strategies in 2023, as activists circle to unlock value through streamlining. ■

M&A activist targets



Number of companies publicly subjected to M&A-related activist demands, by year, demand type, and company region. Sum circled.

Source: insightia a Diligent brand

Pay becomes a priority

Asia-based companies bore the brunt of pay-related demands in 2022, while U.S. issuers prepare for demanding new disclosure requirements, writes Miles Rogerson.

Amid tightening markets and global interest rate rises, compensation is becoming a regular part of investor engagements, with 114 companies facing remuneration demands globally throughout 2022, compared to 86 and 92 throughout 2020 and 2021, respectively.

Asian companies faced the biggest increase in such demands, with 25 campaigns from primary and partial focus activists featuring remuneration-related demands in 2022, compared to seven the year before, according to Insightia's *Activism* module.

> *"Total realized executive pay soared to new heights, with S&P 500 CEOs averaging $65.4 million in total compensation in the 2021 financial year."*

While the number of U.S. remuneration-related campaigns involving primary and partial focus activists declined to 12 in 2022 compared to 17 a year prior, the Securities and Exchange Commission's (SEC) new "pay for performance" disclosure requirements may spur on more compensation-related engagements in the coming year.

Asian activists unlock value

Nippon Active Value Fund was one of the most prolific activists in Asia during 2022, running 13 campaigns throughout the year pushing various Japanese issuers to amend their remuneration practices.

The $157-million fund manager successfully drove Mitsuboshi Belting to initiate a share repurchase in May, as well as push Bunka Shutter to put a 7.1-billion yen ($52 million) share buyback plan and transfer-restricted stock-based compensation system to a shareholder vote.

Pay for performance

The significance of executive compensation in the U.S. is set to be given another boost, thanks to the SEC's new "pay for performance" rules.

In August, the regulator revealed that issuers are now required to disclose the amount of compensation "actually paid" to executives over the past five years and a list of between three and seven metrics on which it is based, including net income, total shareholder return (TSR) for the company and its peer group, and at least one other financial metric.

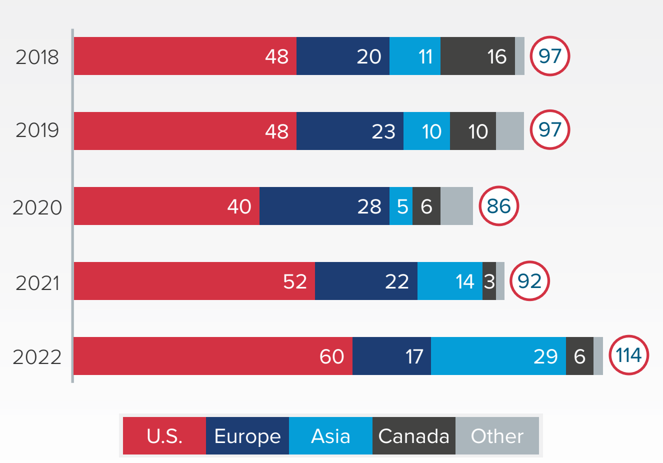
"This rule will help investors receive the consistent, comparable, and decision-useful information they need to evaluate executive compensation policies," said SEC Chair Gary Gensler in an August statement.

Investors are no doubt eager for enhanced disclosure of executive pay structures. Average support for S&P 500 advisory "say on pay" plans reached 87.5% in 2022, an eight-year low. Despite this, total realized executive pay soared to new heights, with S&P 500 CEOs averaging $65.4 million in total compensation in the 2021 financial year, according to Insightia's *Compensation* module.

"It does appear that investors' expectations on executive compensation continue to increase and they have become more willing to express their concerns through the 'say on pay' vote," Bruce Kistler, managing director at Okapi Partners, told Insightia in an interview at the end of 2022. "We also saw a significant backlash against special one-time awards. While one-time awards have always drawn the attention of investors, it seems there was less patience and understanding for those awards in the 2022 season."

Companies already seem to be taking steps to moderate pay rises. Apple CEO Tim Cook announced in January that his 2023 target total compensation is set at $49 million, a reduction of over 40% from his 2022 target, in response to the technology giant's 2022 pay plan facing 36% opposition. ■

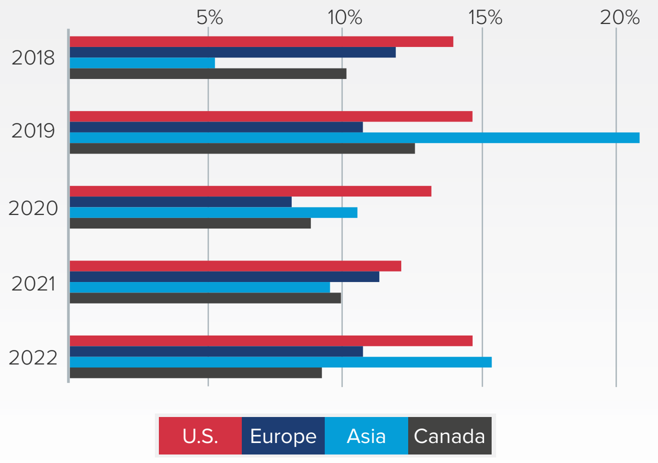
Activist remuneration targets



Number of companies publicly subjected to remuneration-related demands by year and company region. Sum circled.

Source: insightia a Diligent brand

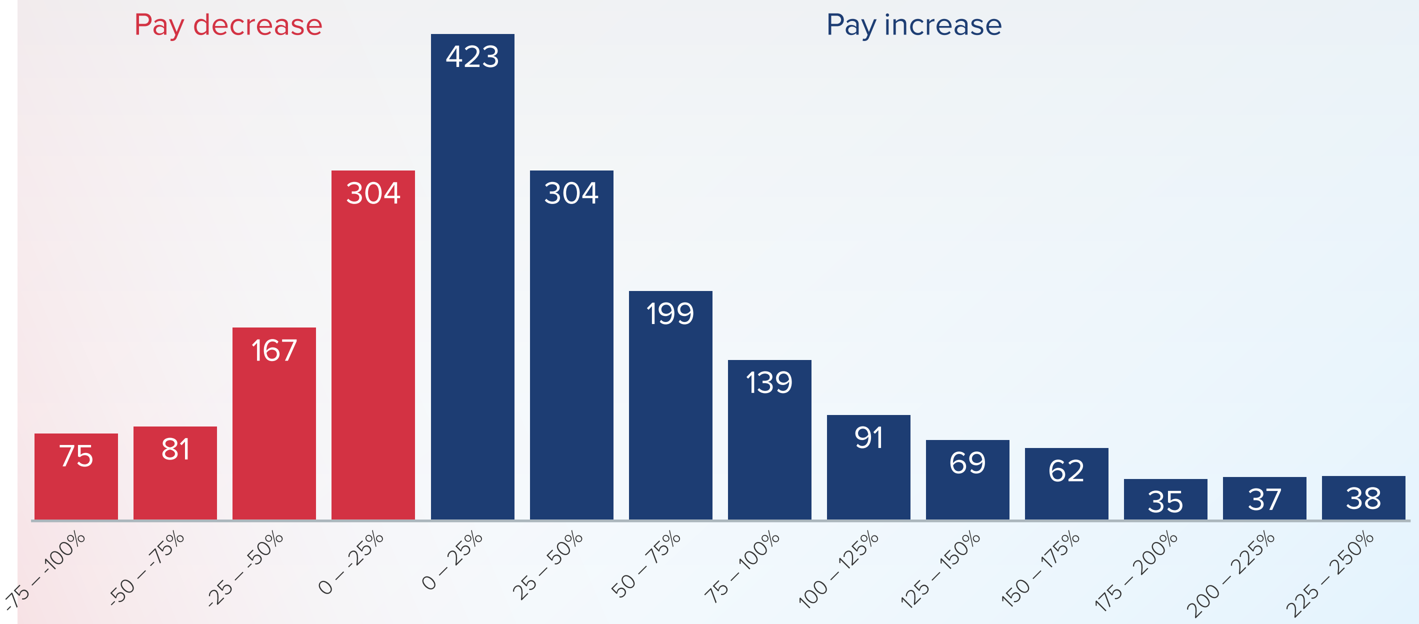
"Say on pay" revolts



Percentage of "say on pay" revolts (<80% support for) as a proportion of total "say on pay" plans subject to a vote, by year and company region.

Source: insightia a Diligent brand

CEO pay change



Percentage change in Total Realized pay of Russell 3000 CEOs between FY2020 and FY2021.
Note: Percentage range capped at +250%. Does not account for 2022 CEO appointments.

Source: insightia a Diligent brand

European activism evolves

In a year bookended by fears of war and recession, shareholder engagements have taken a back seat from the public eye, writes Will Arnot.

As war rages on in the world's second smallest continent, shareholder activism looks to have taken a back seat, with the number of public campaigns across Europe falling to the lowest levels seen since 2015. In 2022, just 198 shareholder activism campaigns went public, compared to 287 and 232 throughout 2020 and 2021, respectively.

"Activists remained committed to holding European-listed companies to account on their ESG commitments in 2022, with 90 ESG-related demands publicly made in 2022, compared to 96 one year prior."

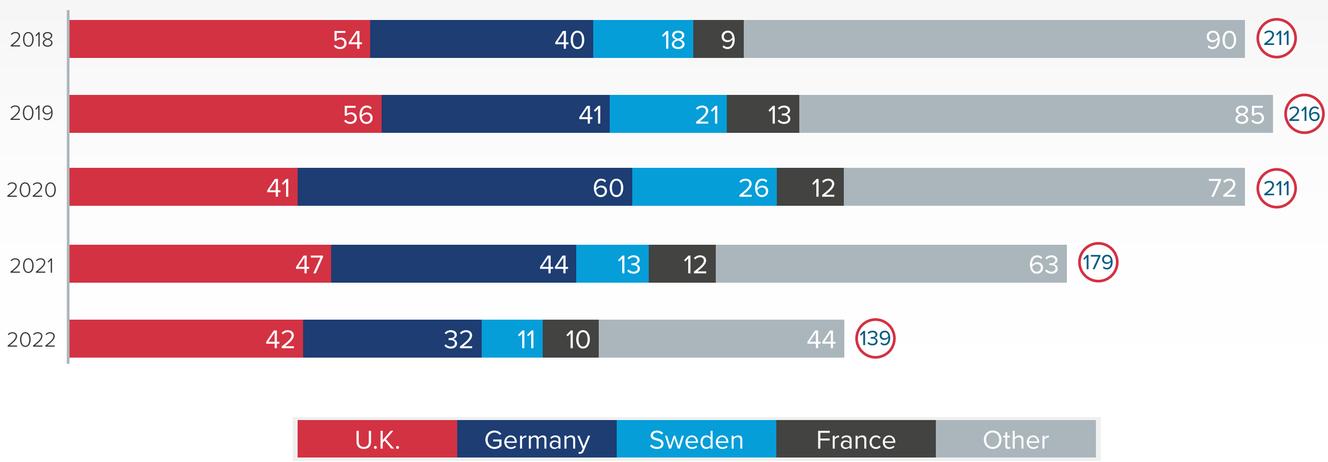
The downwards trend in public activist activity in Europe, according to various investors who spoke with Insightia, reflects an increase in private engagements and settlements between activists and companies.

Andrew Brady, director at SquareWell Partners, told Insightia in an interview that while there are "many reactive elements that make up an activism defence, companies can protect themselves most effectively through pro-activity, having a good ongoing understanding of their shareholders and committing to meaningful engagement," noting that such a culture readily exists within European boards.

All in on ESG

Activists remained committed to holding European-listed companies to account on their ESG commitments in 2022, with 90 ESG-related demands publicly made in 2022, compared to 96 one year prior, according to Insightia's *Activism* module. European companies have also been eager to promptly reach

Activist targets in Europe



Number of Europe-based companies publicly subjected to activist demands, by company HQ and year. Sum circled.

Source: insightia a Diligent brand

withdrawal agreements on various ESG issues, contributing to the decline in proxy contests.

TotalEnergies was targeted in a swift and succinct campaign from Clearway Capital over the company's position in the Russian oil market, with Clearway founding partner Gianluca Ferrari stating in March that "risks of sanctions, [the] reputational hit, and possible retribution by the Russian state associated with staying in the country far outweigh any short-term financial benefits of remaining."

Clearway was supported in its position by the Church of England, which threatened to reconsider its position as a shareholder if the French energy firm did not improve on its steps to suspend trade and halt fresh investments in the market. TotalEnergies later committed to cease all ties with Russia by the end of the year and booked $14.4 billion in impairments on its Russian assets.

In an interview with Insightia, Ferrari noted that the impact of the war on the oil and gas market has highlighted the need for both energy independence from Russia and the speeding up of the transition away from fossil fuels. "I think that TotalEnergies has the ability to play a key role in that transition, and we certainly would like to see them developing further in that direction," he added.

Bluebell Capital Partners has similarly had a successful year pushing European issuers to enhance their ESG commitments. The $250-million fund manager persuaded Solvay to reduce the environmental impacts of its Italian facilities, despite only owning one share in the Belgian chemicals group.

Risk of recession

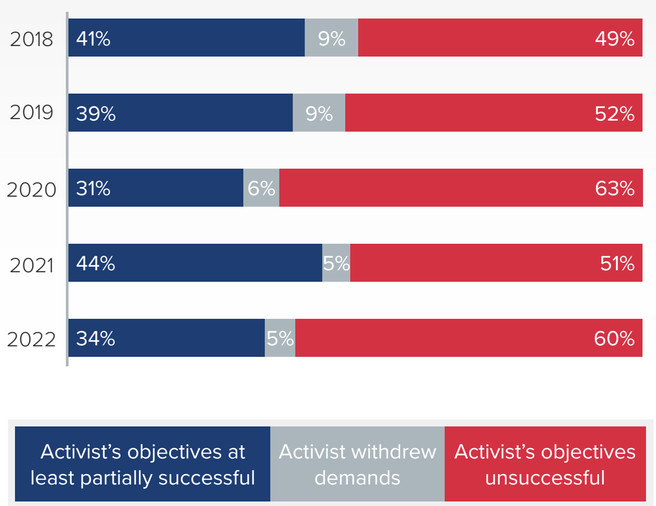
The landscape of activism in Europe may change yet again in 2023, with a looming recession potentially driving a surge in more financially-driven activist engagements.

"The landscape of activism in Europe may change yet again in 2023, with a looming recession potentially driving a surge in more financially-driven activist engagements."

SquareWell's Brady indicated that, in the event of a recession, the consideration given to ESG factors by both companies and investors will change as fund managers will be forced to consider what factors drive returns in a declining market. As such, Europe may bear witness to a rise of campaigns going public around central strategic issues.

"One area we could see an increase in activism may be on issues that focus on the cost-of-living in the 2023 proxy season, specifically referencing the potential for activists to raise concerns with executive pay being out of line with the average employee," Anthony Kluk, head of U.K. at Georgeson, told Insightia in an interview. ■

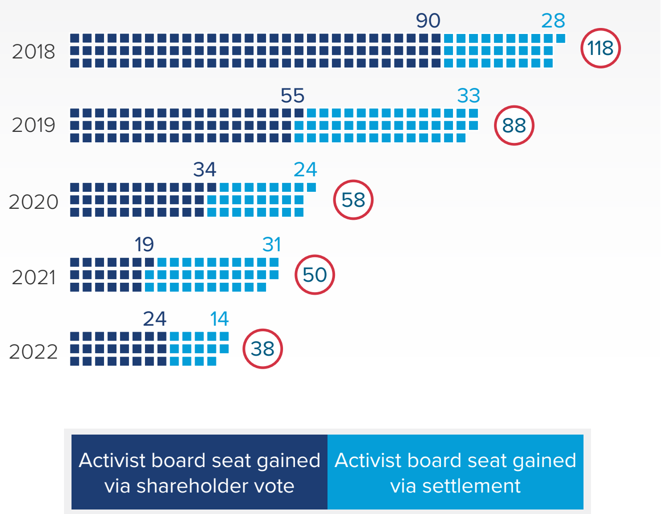
Activist success rates in Europe



Proportion of resolved activist campaigns at Europe-based companies by year and outcome. Note: Rounding may cause summation errors.

Source: insightia a Diligent brand

Activist board seats gained in Europe



Number of board seats gained by activists at Europe-based companies, by year and method. Sum circled.

Source: insightia a Diligent brand

Addressing evolving risks

Amid the heightened focus on a company's bottom line, it is increasingly important for companies to address and mitigate the ever-evolving risks of shareholder activism, writes Amanda Carty, general manager, ESG & data intelligence, Diligent.

"Where ESG issues factor into a campaign, it begins and ends with issues that impact the bottom line."

Amanda Carty
acarty@diligent.com

After years of growth, has ESG activism fallen out of favor? 2021 seemed to be a landmark year for activists yet, in 2022, ESG activist campaigns around the world appeared to be on the decline, as were their success rates.

"ESG activism is suffering a crisis of confidence, beset by declining support, confusion about valuation, and a budding conservative backlash," Diligent's Jason Booth wrote in Insightia's 2022 ESG Activism report. But boards who take their eye off of the ESG ball risk doing so at their own peril.

ESG scrutiny redirected

In Europe, ESG- and remuneration-related activist campaigns significantly declined in number from 2021 to 2022. Overall in 2022, 60% of global activist campaigns featuring both board representation and ESG-related demands had any success, down from a 67 % average for the entire 2018-2021 period.

In a move that would have seemed inconceivable just a few years ago, sustainable investing has generated a negative rather than positive response, as a number of U.S. states threatened to place some of the world's largest financial institutions on their restricted lists for boycotting fossil fuels.

Another previously lauded tactic, linking compensation to ESG goals, received similar backlash. "With stock prices down sharply this year, executive compensation is a likely target," Booth noted. He cited Glass Lewis' concerns about "management teams rewarding themselves based on ESG metrics that are hard to measure."

"Where ESG issues factor into a campaign, it begins and ends with issues that impact the bottom line, including the strength of individual directors and a company's exposure to long-term sustainability risks," Sustainable Governance Partners CEO Jessica Strine said in an interview in the 2022 ESG Activism report.

Amid this heightened focus on the bottom line, social issues have also "taken on new prominence, in particular, racial equity," Strine noted. "Many investors are seeing this issue as financially material, premised on the understanding that a company's reputation, brand, attractiveness to employees and customers, and/or dealings with regulators can be impacted by its handling of risks and opportunities related to social justice."

Bolstering external intelligence and internal defenses

How can companies meet shareholder and stakeholder demands while decreasing vulnerability to investor and legal action? Proxy papers and surveys are a good place to begin for keeping a finger on the pulse of stakeholder sentiment, as are conversations with investors and third-party sources of business intelligence. It's imperative to know what your peers are doing and what your investors want.

At the same time, companies need oversight into critical areas of the business. This includes establishing efficient and effective systems for monitoring and compliance and reinforcing these systems with a company culture that prioritizes both transparency and compliance.

From there, companies would be wise to assess and define their purpose with an eye on stakeholder perspectives. This means setting ESG targets based on what companies are seeing among peers and hearing from investors, using multiple ESG ratings, frameworks, and standards as a guide, and consulting with advisers on the issues that boards should keep on their radar to guide oversight priorities and reporting.

Once companies have established this foundation, they will be much better prepared to build a defensible and auditable ESG program.

Stay ahead of activist trends

Increased visibility is the first step to building such a program and reducing vulnerability to investor, shareholder, and legal action.

Companies can achieve this visibility by leveraging data from across the organization, combining it with proprietary intelligence, and bolstering these efforts with the right technology solutions.

With a 360-view, followed by purposeful action, companies can strengthen their ability to identify which red flags to escalate on the board agenda, monitor evolving risks and mitigate them as needed, and document compliance and risk management efforts in defensible, auditable detail.

With these measures in place, your company will be better prepared to face whatever trends 2023 has in store. ■

Activists overwhelm Asian issuers

In a challenging year which saw an influx of activism throughout Asia, investors were keen to push companies to work towards maximizing shareholder value, writes Miles Rogerson.

Activists continued ramping up the number of campaigns targeting Asia-headquartered companies during 2022, although progress was hampered by a declining success rate.

> *"Cross shareholdings offer a huge drag on a company's performance by effectively withholding cash from reinvestment in the company or rewarding shareholders."*

Of the 223 activist campaigns to take place throughout Asia in 2022, 50 were fully or partially successful, with 97 unsuccessful and 76 ongoing, equating to a 22.4% success rate for both resolved and ongoing campaigns, according to Insightia's *Activism* module. Comparatively, Asia-headquartered companies faced 165 activist campaigns in 2021, 60 of which were either fully or partially successful, equivalent to a 36.4% success rate.

"Management has been protected by founders and cross-shareholdings for a long time," Tsuyoshi Maruki, president and CEO of Strategic Capital, told Insightia in an interview. "Having said that, we still dare to invest in such companies which also have poor corporate governance and poor capital allocation policies because, while change may be more difficult, the stock price is extremely undervalued."

Maximizing shareholder value

Hibiki Path Advisors and Nippon Active Value Fund ranked among the most prolific activists in Asia last year, running 19 and 13 campaigns throughout 2022, respectively, according to Insightia's *Activism* module. Nippon's focus remained mostly on remuneration and share repurchase demands, successfully pushing Japanese manufacturer Mitsuboshi Belting to introduce a stock-based director compensation plan and implement a share repurchase in May.

Returning cash to shareholders was a key concern for activists in the past year when engaging with Asia-based companies, with 78 companies in the region facing demands of this kind in 2022, compared to just 35 in all of 2021. This marks the highest level of return cash to shareholder demands on record, with SK Chemicals, Samsung C&T, and Bunka Shutter among the companies to face demands of this kind in 2022.

The prominence of return cash to shareholder demands is in part due to the tendency of Asian-listed companies, particularly in Japan, to retain a significant amount of cash on their balance sheets. Some 40% of non-financial companies in the Tokyo Stock Exchange's (TSE) broad TOPIX index ended 2022 with net cash of more than 20% of their equity, according to CLSA Strategist Nicholas Smith.

Strategic Capital saw success with a campaign at Japanese special-purpose equipment company Kyokuto Kaihatsu Kogyo and partial success when it called on Arisawa Manufacturing to establish a new management plan aimed at improving shareholder value.

"Cross shareholdings offer a huge drag on a company's performance by effectively withholding cash from reinvestment in the company or rewarding shareholders," Paul ffolkes Davis, chairman of Rising Sun Management, told Insightia in an interview.

Shifting attitudes

Whether they like it or not, Asian companies are more regularly having to contend with activist engagement. Industry members are noting, however, that a growing number of regulators and companies are accepting activists more readily than in previous years. "In Japan, it is becoming accepted that activism can be effective," Maruki told Insightia.

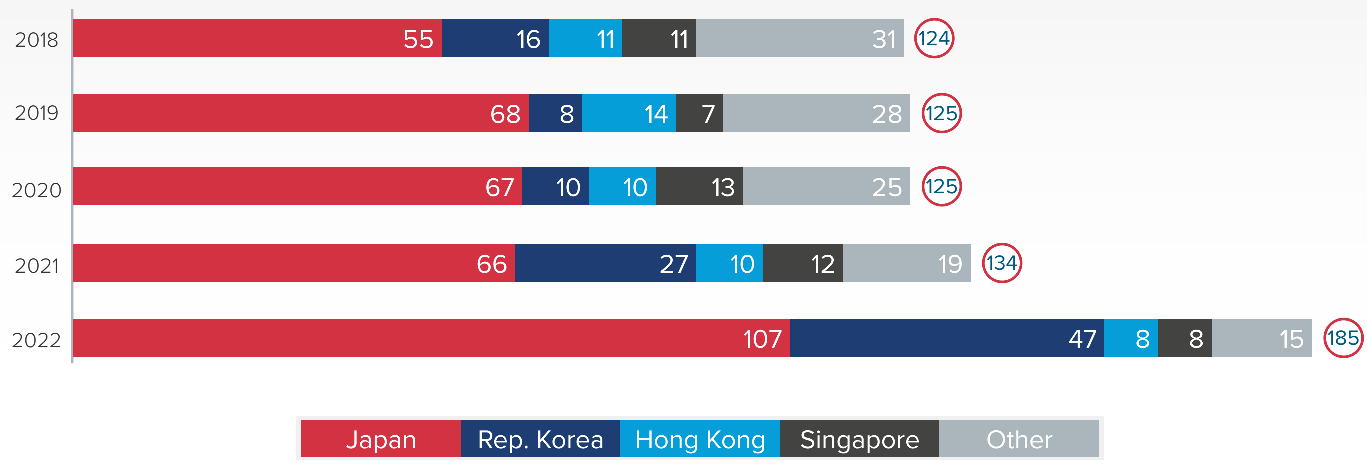
The rather mixed reception activists receive from Asia-headquartered companies hasn't prevented activists from attempting governance overhauls, however, with 77 companies in Asia publicly subjected to governance-related activist demands in 2022, compared to 50 one year prior. This marks the highest number of governance-related demands on record for the region.

Prominent U.S. activist Elliott Management managed to secure a board seat at Japanese technology giant Toshiba for its Senior Portfolio Manager Nabeel Bhanji, who won 76% support from shareholders at the company's June 28 annual meeting.

Oasis Management was also active in the region during 2022 and is currently in the middle of a campaign to revamp the board of Japanese elevator maker Fujitec. Oasis accused the outside directors of losing "all credibility and trust with shareholders" after failing to eject former CEO Takakazu Uchiyama from the company's leadership, amid accusations of "suspicious related-party transactions."

"For 2023, the direction of travel is in favor of increased levels of activism at all levels of the market, and we expect the trend of consolidation amongst smaller companies and de-consolidation among larger companies, such as the ongoing situation at Toyota, to continue," Davis added.

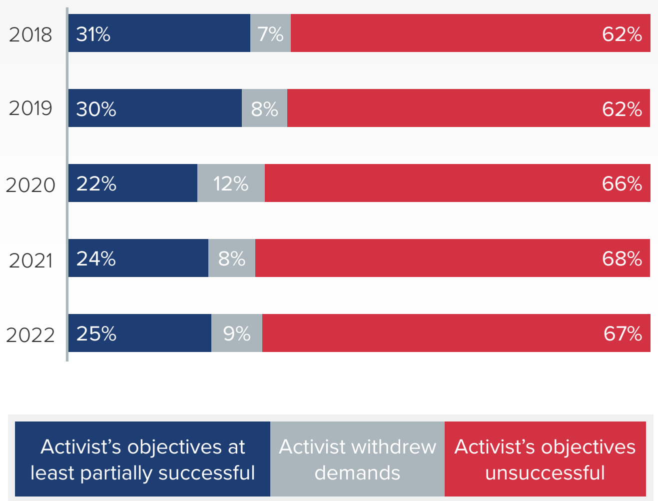
Activist targets in Asia



Number of Asia-based companies publicly subjected to activist demands, by company region and year. Sum circled.

Source: insightia a Diligent brand

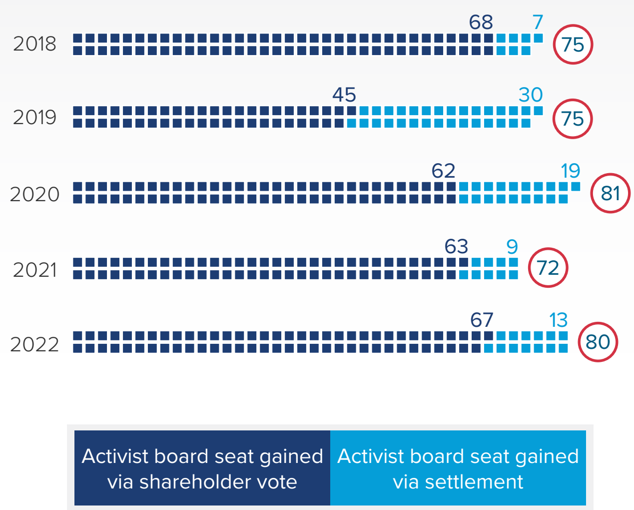
Activist success rates in Asia



Proportion of resolved activist campaigns at Asia-based companies by year and outcome. Note: Rounding may cause summation errors.

Source: insightia a Diligent brand

Activist board seats gained in Asia



Number of board seats gained by activists at Asia-based companies, by year and method. Sum circled.

Source: insightia a Diligent brand

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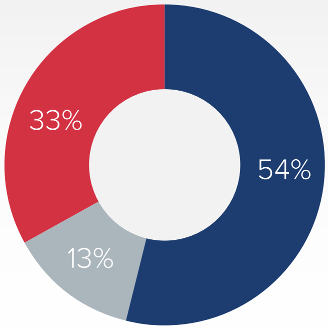
Poll position

Every Tuesday, we ask for your thoughts on an activism or voting trend via our newsletter and social media feeds. Here, Kieran Poole collates some of our favourite polls from last year.

January 2022

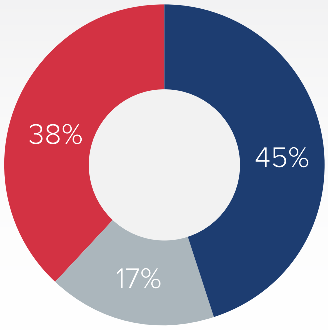
Do you expect 2022 to be an even bigger year for M&A activism?



Yes | Maybe | No

February 2022

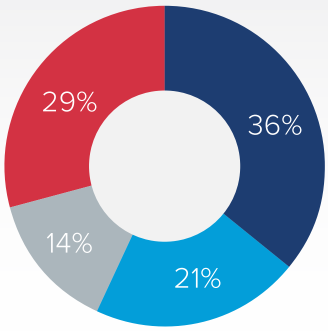
Will the energy sector remain attractive to activism after 2021's huge Engine No. 1 and ExxonMobil showdown?



Yes | Maybe | No

March 2022

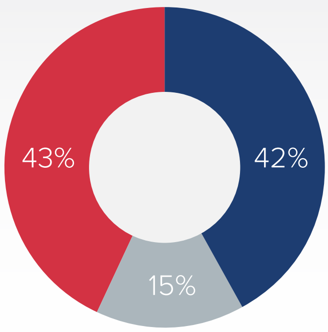
With energy prices soaring in response to uncertain supplies, is the sector more or less vulnerable to various forms of shareholder activism?



Less vulnerable | More ESG, less financial | More financial, less ESG | More vulnerable

April 2022

Do you expect to see more "celebrity activism" after the Elon Musk and Twitter situation?

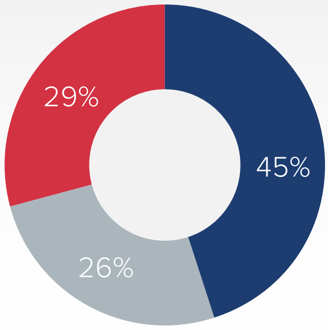


Yes | Maybe | No

May 2022

Activists were at least partially successful with 41% of campaigns at Europe-based companies in the first three months of 2022. Do you expect this percentage to rise next year?

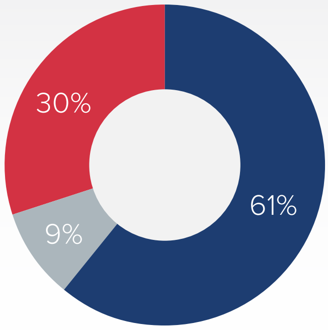
Yes | Maybe | No



June 2022

Do you expect even more ESG shareholder proposals in the 2023 proxy season?

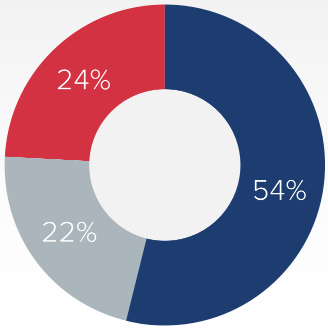
Yes | Maybe | No



July 2022

42 South Korea-based companies were publicly subjected to activist demands in the 12 months ending May 1, 2022. Do you expect a higher number in the next 12 months?

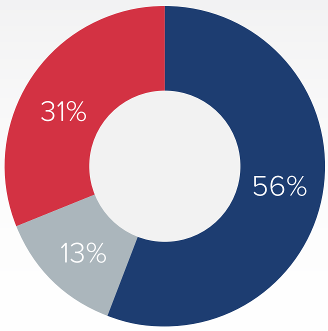
Yes | Too early to tell | No



August 2022

There were 79 activist short campaigns at U.S.-based companies last year. As of June 30, 2022, there had been 33 this year. Do you expect 2022 campaigns to beat last year's total?

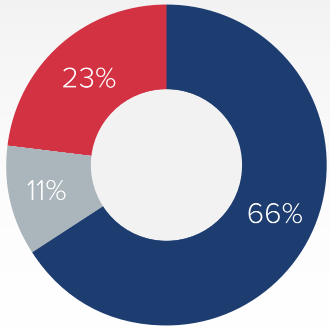
Yes | Maybe | No



September 2022

Average support for management "say on climate" proposals dropped to 90.2% as of July 31, 2022, compared to 96% throughout 2021. Do you expect support to drop again next year?

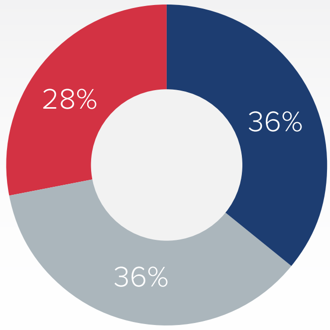
Yes | Too early to tell | No



October 2022

Do you think "responsible investing" could be seriously damaged by anti-ESG state policymakers?

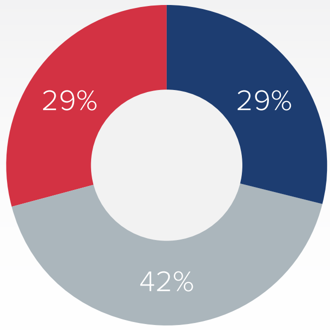
Yes | Too early to tell | No, ESG is too important



November 2022

As of November 15, 2022, 6.8% of S&P 500 constituents had dual-class structures in place, compared to 7.2% at the end of 2021. Do you expect this number to continue to decrease in the next 12 months?

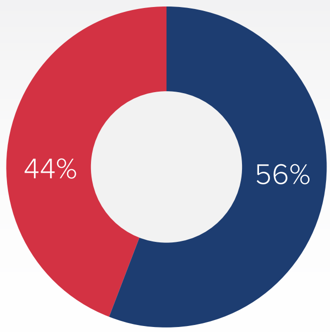
Yes | Too early to tell | No



December 2022

Does Bluebell Capital's argument at BlackRock, claiming that the asset manager should replace CEO Larry Fink and launch a review of its ESG investment policy, have merit?

Yes | No



Who's vulnerable?

Rebecca Sherratt highlights a selection of the most vulnerable companies in the Insightia *Vulnerability* index that have not yet been engaged by an activist.

**Data as of January 24, 2023.*

Quaker Chemical Corp

Vulnerability percentile rank: 96%
Sector: Basic materials Market-cap: $3.4B (Mid-cap)
Key vulnerabilities: Profitability, performance, director support

Despite a significant minority holding from QH Hungary Holdings and an agreement to elect three members to the board, an activist may still see an opportunity for representation. Quaker's Return On Capital Employed (ROCE) stands at 5.8%, underperforming the chemicals industry's average of 12%. As such, divestment and cost-cutting measures could form the center of an activist campaign.

Helen of Troy

Vulnerability percentile rank: 97%
Sector: Consumer defensive Market-cap: $2.7B (Mid-cap)
Key vulnerabilities: Performance, profitability, director tenure

Reporting $559 million in net sales for the third quarter of fiscal 2023, a 10.6% decline compared to the third quarter of fiscal 2022, Helen of Troy could fall victim to an activist questioning its management strategy. With margins lagging peers as well, an activist could be encouraged to push for changes. The company's overtenured CEO and chair could lead to a board refreshment campaign.

Stericycle Inc.

Vulnerability percentile rank: 99%
Sector: Industrials Market-cap: $4.9B (Mid-cap)
Key vulnerabilities: Performance, profitability, institutional ownership, director age

Stericycle was first noted as vulnerable in our 2017 annual review and is still vulnerable to activist investment, despite since being targeted in a board refresh campaign. The Illinois-based waste management firm has been dragged down by its declining performance and margin concerns. An activist investor could put pressure on management to cut excessive expenditure.

Hudson Pacific Properties

Vulnerability percentile rank: 98%
Sector: Real estate Market-cap: $1.4B (Small-cap)
Key vulnerabilities: Performance, profitability, institutional ownership, director age

Hudson Pacific is already facing pressure from shareholders to refresh its board, with two directors, including CEO Victor Coleman, facing upwards of 15% opposition at the real estate investment trust's (REIT) 2022 annual meeting. An activist could seek a board revamp and demand Hudson Pacific remedy its poor operating performance to fix its stock market woes.

NRG Energy

Vulnerability percentile rank: 88%
Sector: Utilities Market-cap: $7.5B (Mid-cap)
Key vulnerabilities: Valuation, performance, number of directors, director tenure

In a sector long popular with activists, NRG could find itself in an activist's crosshairs thanks to recent shareholder jitters. The Texas-based energy company is no stranger to investor revolts, with four directors facing upwards of 20% opposition across its past three annual meetings.

Lumentum Holdings

Vulnerability percentile rank: 97%
Sector: Communication services Market-cap: $4.1B (Mid-cap)
Key vulnerabilities: Balance sheet, growth, performance

Activists may make a case for change at Lumentum Holdings, driven partly by its decline in earnings and total shareholder return (TSR). Lumentum's failed merger with laser-based equipment maker Coherent in 2021 no doubt also ruffled investors' feathers, with Coherent opting to terminate the deal. Institutional investors are also voicing their concerns regarding pay alignment, with Lumentum's advisory "say on pay" proposal facing 18% opposition at the company's 2022 annual meeting. ■

Our track record

42 companies that Insightia *Vulnerability* reporters have highlighted as vulnerable to activist engagement in reports between 2018 and 2022 were publicly subject to activism in 2022. Rebecca Sherratt picks some of the highlights.

Ventas

Report date: February 9, 2022
Activist: Land & Buildings
Key vulnerabilities: Valuation, growth, profitability

Date targeted: March 6, 2022
Demands: Appoint personnel, remove personnel

Just 25 days after Insightia said Ventas was vulnerable to activism, Land & Buildings nominated its founder, Jonathan Litt, to the real estate company's board, claiming the company had suffered a "massive loss of credibility" due to consistent underperformance. Land & Buildings may have withdrawn from the contest in April, after failing to win the favor of Glass Lewis and Institutional Shareholder Services (ISS), but continues to advocate for Ventas to take a more disciplined approach toward capital allocation and to enhance shareholder communications.

Matthews International

Report date: July 28, 2022
Activist: Barington Capital Group
Key vulnerabilities: Valuation, performance, director tenure

Date targeted: December 13, 2022
Demands: Return cash to shareholders, governance

Insightia first identified Matthews International as vulnerable in July 2022, claiming that the conglomerate could face calls to spin off one of its many divisions to remedy its "languishing" stock price and stagnant earnings. Indeed, in December, Barington Capital Group called on Matthews to separate its packaging business, SKG, as well as refresh its board, review its operating performance, consider a strategic review, and put more capital toward buybacks. The activist believes that the stock could reach between $28.84 and $56.65. As of December 30, 2022, the stock traded at $30.44, higher than its $27.43 share price at the time of the report.

Lyft

Report date: September 6, 2022
Activist: Sachem Head Capital Management
Key vulnerabilities: Growth, profitability, performance
Date targeted: November 14, 2022
Demands: N/A

Just two months before Sachem Head Capital Management disclosed a 0.5% stake in Lyft, Insightia identified the ridesharing giant as susceptible to activism, citing how attractive the company would be to budding activists given its undervalued stock and "bucketloads of cash." While Lyft's super-voting shares will likely make a proxy contest all the more challenging, Sachem Head could well be gearing up to revamp the board.

Avalara

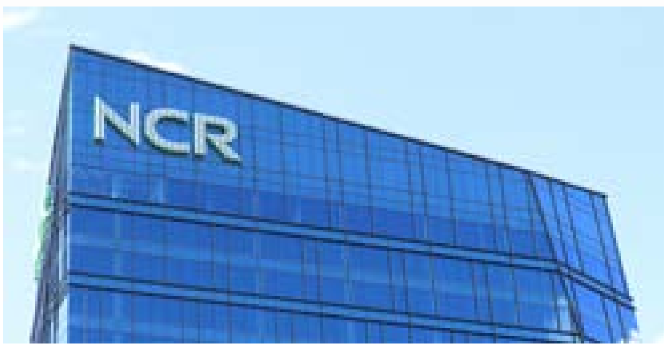
Report date: April 28, 2022
Activist: Altair U.S. (Richard Bailey)
Key vulnerabilities: Performance, valuation, governance
Date targeted: September 8, 2022
Demands: Oppose M&A

Altair U.S. "strongly" opposed Avalara's proposed $8.2-billion sale to private equity firm Vista Equity in September, four months after Insightia noted the company's costly acquisitions in recent years could prompt activists to push for a change in strategy. Proxy advisers were split on the takeover, with ISS supporting the deal and Glass Lewis echoing Altair's concerns regarding potential conflicts of interest surrounding the sales process. Ultimately, the take-private was approved by 84% of votes cast at Avalara's October annual meeting.

NCR Corp.

Report date: December 2, 2021
Activist: Engaged Capital
Key vulnerabilities: Performance, valuation, governance
Date targeted: March 22, 2022
Demands: Appoint personnel

Despite NCR being no stranger to activism, Insightia flagged the technology company as vulnerable back in December 2021, citing declining support for director reelections and long-term underperformance relative to peers. Seemingly out of the blue, in March NCR announced that Engine Capital's founder Glenn Welling, together with Laura Sen, former CEO of BJ's Wholesale Club, would be standing for election at its May annual meeting. In September, the company revealed it will split its digital commerce and ATM businesses to maximize shareholder value. ■



The activist short seller top five

Despite a lull in short campaigns this year, brought on in part by the Department of Justice's (DOJ) investigation into short selling tactics, 2022 proved profitable for the shorts market. Activist short sellers enjoyed stronger returns this year as sharp declines in stock markets worldwide rewarded investors making short bets on overvalued companies. After years of investor money flooding into ESG, short sellers also turned their attention to companies whose share prices were inflated due to exaggerated claims they are addressing environmental or social ills.

**Total campaign return is a calculation of the stock price change percentage, minus any dividend payment obligations, of campaigns initiated in 2022 from the close prior to the campaign's announcement until the last close on the defined period.*

1. Hindenburg Research

Activist short campaigns launched in 2022: 10
Average one-month total campaign return: 23.85%
Average target market cap: $9.5B
Insightia One news stories: 23

Nate Anderson's Hindenburg Research had a banner year, both in terms of the number of campaigns launched by the fund, but also in the high-profile nature of several of its engagements.

In May, Hindenburg went short on Twitter, predicting Tesla CEO Elon Musk would balk on his initial $44-billion takeover bid for the social media platform. Within a week, the social media giant's stock lost roughly 30% of its value.

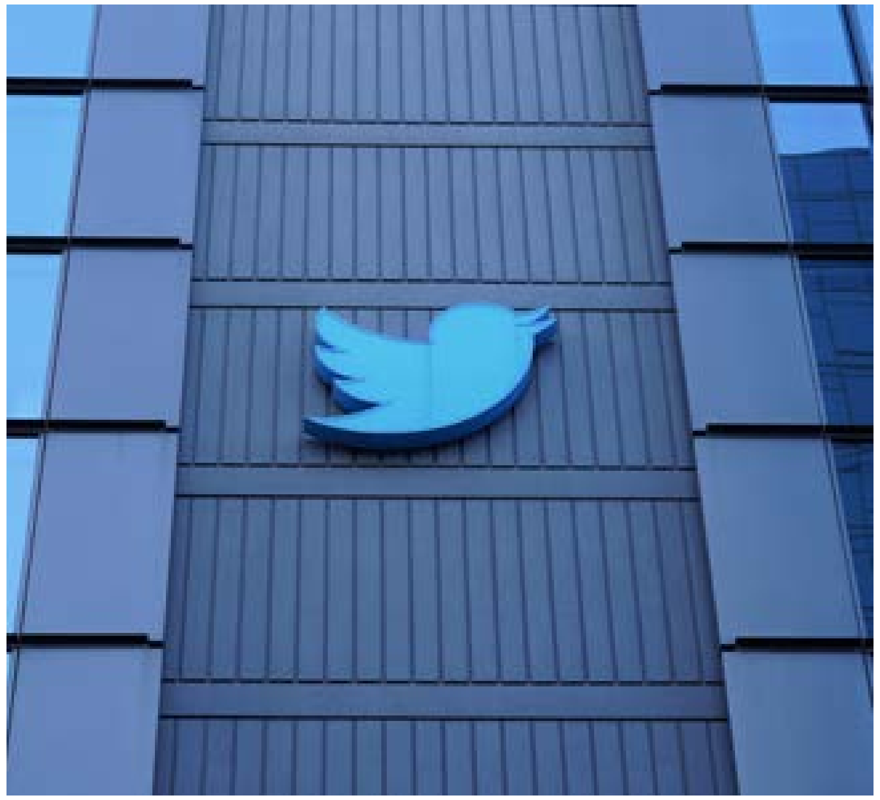
Among Hindenburg's biggest wins of 2022 was cryptocurrency company Singularity Future Technology, which boasted returns of over 90%, according to Insightia's *Vulnerability* module. The logistics company fired its chief financial officer just one month after the cryptocurrency company's chief executive resigned, amid fraud allegations.

Hindenburg also got the last laugh when, in September, former Nikola CEO Trevor Milton was convicted of fraud, two years after the short seller accused him of lying to investors about the company's technology.

"I think a lot of people are holding back because of the market conditions," Anderson told Insightia in an interview, "If the market is tanking, we're going to just produce more research and release it."

2023 is set to be another busy year for Hindenburg, having already accused Adani Group of "brazen" market manipulation and accounting fraud. The report shaved $12 billion off the market value of seven public companies within the conglomerate in just one day.

"Our hypothesis is that there's going to be more financial manipulation to try to account for the shortfall of [companies'] financial realities," Anderson added.



If the market is tanking, we're going to just produce more research and release it."

The activist short seller top five

2. Spruce Point Capital Management

Activist short campaigns launched in 2022: 12
Average one-month total campaign return: 3.32%

Average target market cap: $14.1B
Insightia One news stories: 17

In the words of its founder, Ben Axler, Spruce Point Capital Management is “industry agnostic.” This was certainly the case in 2022, with the short outfit launching campaigns at companies across a variety of sectors such as footwear, packaged foods, basic chemicals, and power generation equipment.

The latter marks what Spruce Point considers its most successful campaign of the year, Axler told Insightia in an interview. In June, Spruce Point revealed a short position in Generac Holdings, claiming the company was deflecting from its core challenges by attempting to reposition itself as a clean energy company, going on to detail a host of serious concerns including “irrational” and “shady” acquisitions and “ballooning receivables.”

At the time, Spruce Point predicted a 40%-50% downside risk. At its lowest point since the release of the report, Generac’s share price had fallen by over 59% from $212.57 per share to $86.29.

Spruce Point’s other targets in 2022, including apparel manufacturer FIGS and technology services firm TaskUs, have also seen their share prices fall by 40% and 51.23%, respectively, as of December 30, 2022, since the initial release of short reports.

Axler told Insightia that 2022’s market has demonstrated how valuable patience can be for short sellers, as “not all stock prices reflect [Spruce Point’s] view of fundamental reality as quickly as we would like.”

3. NINGI Research

Activist short campaigns launched in 2022: 4
Average one-month total campaign return: 6.57%

Average target market cap: $2.0B
Insightia One news stories: 11

NINGI Research is a newcomer to Insightia’s top short seller’s ranking, having been founded just earlier this year with the purpose to “educate the public, stimulate public debate on the issues we disclose about companies, and encourage thought-processing on complex issues,” according to NINGI Senior Analyst, Niklas Ningi, in an interview with Insightia.

The short outfit wasted no time getting stuck in, issuing five short reports at a variety of micro- and mid-cap companies throughout the U.S., Sweden, and Germany. Its report arguing Northern Data went bankrupt “the moment” it acquired Dutch cryptomining company Decentric Europe was especially damning. Northern Data’s share price now languishes at $6.08 per share, having topped $79.30 earlier in 2022.

NINGI also accused Swedish cloud computing company Sinch of misstating its accounts to “beat analysts’ estimates and pump its share price.” Sinch’s share price tanked 28% on the day of publication.

“To identify a company, we try to be open-minded, and often it starts with an intuition of a team member,” Ningi said. “If the filings and statements of a company don’t add up, we take a closer look.”

The activist short seller top five

4. Viceroy Research

Activist short campaigns launched in 2022: 3
Average one-month total campaign return: -5.86%

Average target market cap: $3.0B
Insightia One news stories: 22

Viceroy Research had an eventful 2022, which saw its campaign from the year prior at Adler Group continue, a new report at Swedish property manager Samhällsbyggnadsbolaget, an attack on spyware app Truecaller, as well as the launch of its high-profile campaign at Home REIT.

In May, German real estate company Adler saw its stock tank after its accounting firm KPMG refused to sign off on its annual results. Adler's share price was down nearly 90% over the year. Viceroy's other target, Samhällsbyggnadsbolaget, also saw its share price decline by 73% in 2022, following its short report.

"2022 has been Viceroy's most successful year," Viceroy Research Analyst Gabriel Bernarde said in a statement to Insightia. "We say this every year because snowballing dumb money from fads and frauds of all sizes across the globe has gotten progressively easier."

Viceroy most recently wrote a report on Home REIT, saying that financial data of the company's tenants show that "many cannot afford rent, have not been paying rent, are in administration, are run by bad actors, or simply do not provide social housing services."

"Our focus going into 2023 will be the continued unfurling of historically 'safe' industries: real estate, industrials, etc.," Bernarde concluded. "Complacency has led to rampant governance failures which we believe vastly outweigh perceived safety in these markets."

"Snowballing dumb money from fads and frauds of all sizes across the globe has gotten progressively easier."

5. Blue Orca Capital

Activist short campaigns launched in 2022: 4
Average one-month total campaign return: 11.3%

Average target market cap: $2.9B
Insightia One news stories: 9

Blue Orca Capital had a particularly busy 2022, targeting companies throughout the U.S. and Canada in the basic materials, retail, waste management, and real estate sectors. "2022 was the beginning of a major decline of the assets and investments that had been the most ludicrously valued in the darkest corners of the market," Soren Aandahl, chief investment officer and founder of Blue Orca, told Insightia in an interview. "For years, the market rewarded blindness to accounting red flags, with many investors ignoring the voice in their head that said something might be fraudulent or a scam. I think 2022 was a kind of almighty reckoning for many of them."

Among Blue Orca's most high-profile campaigns was its claim in April that Innovative Industrial Properties was nothing more than "a marijuana bank masquerading as a REIT." Shortly after the release of the report, a class action lawsuit was filed against the company on behalf of its shareholders, alleging it failed to disclose its true business purpose and misrepresented property values.

More recently, Blue Orca fired accusations in October that wood pellet manufacturer Enviva was "flagrantly greenwashing" its procurement processes. Enviva retorted that Blue Orca's report contained "numerous errors" and "repeats previous unsupported speculation" but that didn't stop its share price from plummeting 22% within a day of the report's release.

"Clean-tech and ESG witnessed a perfect storm of increased capital and investor mandates chasing a very narrow universe of actionable investment ideas and legitimate ESG destinations," Aandahl said. "It has resulted in all sorts of snake-oil salesmen having access to capital where otherwise investors would be far more skeptical." ■

"2022 was the beginning of a major decline of the assets and investments that had been the most ludicrously valued in the darkest corners of the market."

Fewer players, more money… again

2022 was a difficult year for short sellers, amid the U.S. Department of Justice (DOJ) probe into activist short selling tactics and surging interest rates, but campaigns proved no less profitable, writes Joe Lyons.

Despite both the declining number of activist short campaigns and short sellers initiating campaigns last year, average one-week campaign returns skyrocketed to 8.9%, compared to 5.2% in 2021.

Profits in 2022 also far exceeded the average S&P 500 returns the previous year, despite 6.7% average one-month campaign returns nearly halving from 11.9% the year before, according to Insightia's *Activist Shorts* module.

Shaky start

It was reported at the start of 2022 that the DOJ's investigation into short selling tactics was fully underway, with tens of activist short sellers reportedly under the microscope, including Andrew Left's Citron Research and Carson Block's Muddy Waters.

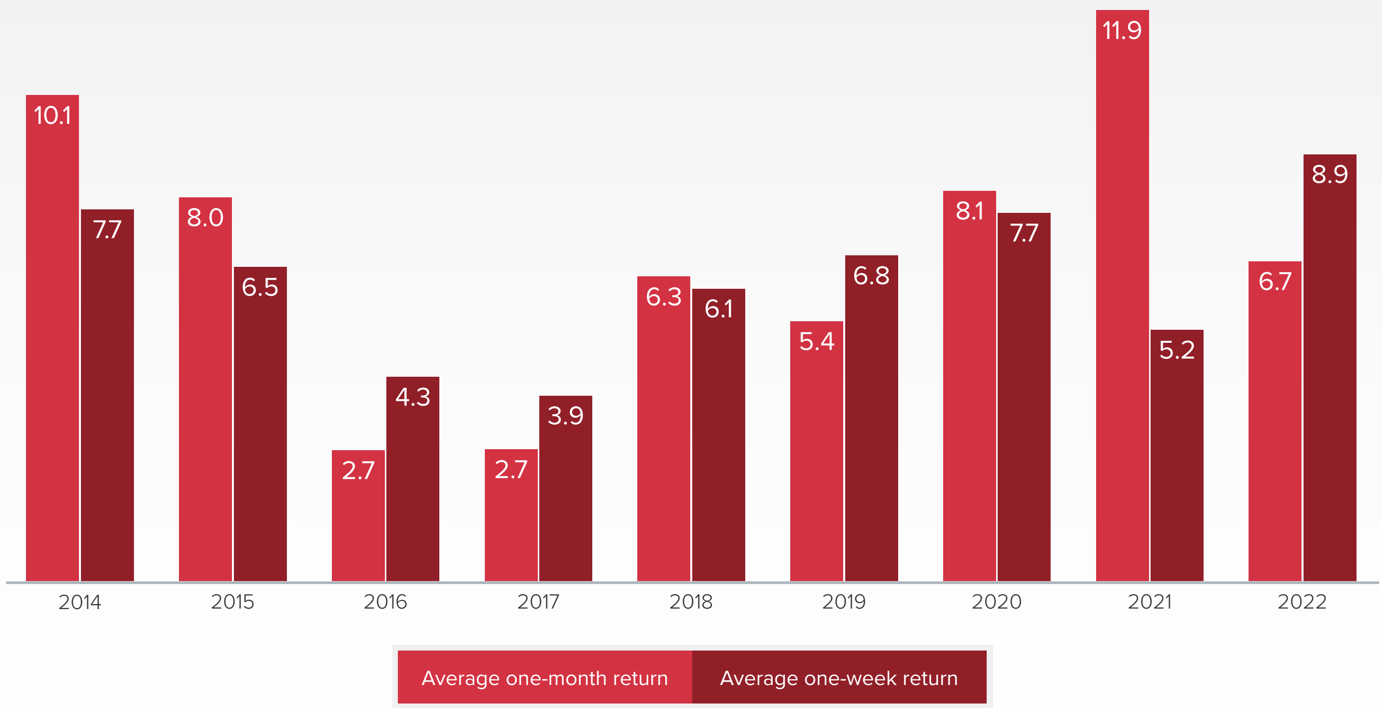
Amid the interest from the DOJ, Left released his first short report since being squeezed out of his GameStop position in 2021 by retail investors at Agilon Health in July, accusing the company of being "designed for abuse." Muddy Waters remained active releasing multiple reports, and other names reportedly involved in the investigation continued to initiate campaigns, too.

Of the 22 short sellers that released reports in both 2020 and 2021 only five ceased activity last year, possibly for a variety of reasons.

Sharp decline

In 2022 96 short campaigns were launched overall, substantially fewer than the 126 launched throughout 2021 and the 157 seen

Global activist short campaign returns



Average one-month and one-week activist short campaign returns globally.
Note: Campaign return is a calculation of the stock price change percentage, minus any dividend payment obligations, of campaigns initiated from the close prior to the campaign's announcement until the last close on the defined period. A positive return is good for the short seller.

Source: insightia a Diligent brand

the year before. Though the DOJ investigation may have had a slight impact on campaigns, White Diamond Research Head Analyst Adam Gefvert attributed the decline to there being fewer ideas.

"There's fewer questionable companies now that the market is crashing, they aren't able to pump their stocks up, so their stock prices are so low that they aren't a good target for activist short sellers," said Gefvert in an email to Insightia.

"Despite the past two years seemingly being good for short sellers, publishing openly has become less attractive due to the increased levels of vitriol directed at short sellers."

The short seller went after a couple of healthcare companies in 2021, a sector which was subject to seven fewer campaigns in 2022, and also alleged Israeli technology company A2Z was "non-investible." The number of technology companies targeted by activist short sellers was 40% lower than in 2021, partly due to the massive sell-off in technology stocks throughout the year, making it a less fertile ground for potential activist short campaigns.

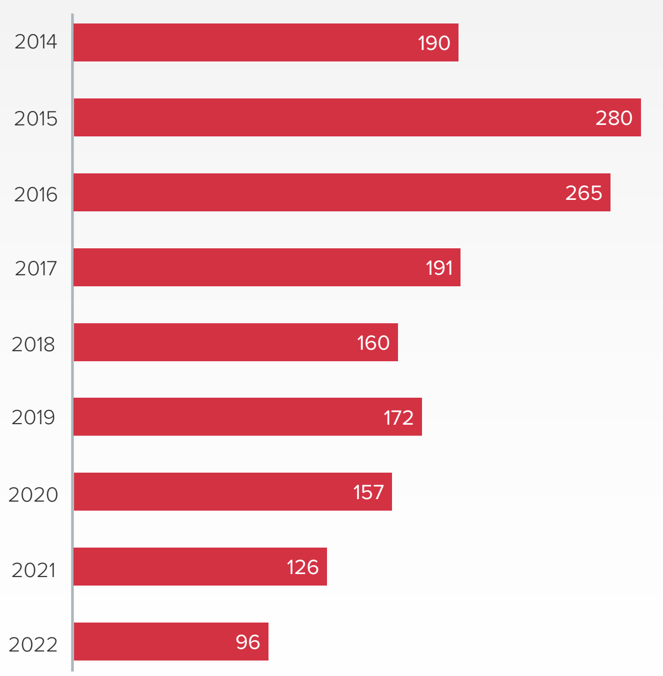
China, a historically potent ground for activist short sellers, only saw three campaigns at companies headquartered there last year, down from 13 the year before. Anne Stevenson-Yang, co-founder of J Capital Research, thinks that may be because there is "so much manipulation around Chinese stocks that it's hard to trade them on the fundamentals."

Fewer players

Last year also saw fewer activist short sellers initiate campaigns with only 28 active, as opposed to 41 in 2020 and 34 in 2021. "Despite the past two years seemingly being good for short sellers, publishing openly has become less attractive due to the increased levels of vitriol directed at short sellers," Muddy Waters Research founder Carson Block told Insightia in an email. "I suspect this is part of the reason why fewer short sellers have been openly publishing their views since 2020."

But Block saw the downturn in other players more optimistically, saying it "leaves more opportunities for those of us who continue this work that's critical to healthy markets." And with an uptick in campaigns during December, it might be high time for active participants to take advantage of a less crowded herd of activist short sellers in 2023. ■

Activist short campaigns



Number of activist short campaigns launched globally, by year.

Source: insightia a Diligent brand

Top activist short allegations in 2022

Most common allegations made by activist short sellers against companies, globally, in 2022.

Source: insightia a Diligent brand

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