



Summary of Activism in 2023 and a Preview of Activism in 2024

Posted by Andrew Freedman, Olshan Frome Wolosky LLP, on Wednesday, February 28, 2024

Editor’s note: Andrew Freedman is Co-Managing Partner and Chair of Shareholder Activism Practice at Olshan Frome Wolosky LLP. This post was prepared for the Forum by Mr. Freedman. Related research from the Program on Corporate Governance includes [The Long-Term Effects of Hedge Fund Activism](#) (discussed on the Forum [here](#)) by Lucian A. Bebchuk, Alon Brav, and Wei Jiang; [Dancing with Activists](#) (discussed on the Forum [here](#)) by Lucian A. Bebchuk, Alon Brav, Wei Jiang, and Thomas Keusch; and [Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System](#) (discussed on the Forum [here](#)) by Leo E. Strine, Jr.

While shareholder activism in the U.S. was robust in 2023, we fell just short of a breakout year in terms of the number of activist engagements and other metrics. As expected, many activists, particularly would-be first-time activists, stood on the sidelines in order to get a sense of what a full year under the universal proxy card (“UPC”) rules would look like. Similarly, some activists were hesitant to jump into the fray until the Securities and Exchange Commission (“SEC”) announced final rules governing its proposed modernization of the Schedule 13D reporting system. Nevertheless, shareholder activists proved to be highly impactful in 2023 in terms of their ability to influence boards, obtaining a record number of board seats since 2018.

Global shareholder activism in 2023, despite extraordinary macroeconomic and geopolitical uncertainty, was just as robust as in 2022. With sharp spikes in the number of companies subject to activist campaigns in certain foreign jurisdictions, including Canada and Asia, U.S. activism accounted for less than 50% of global activity for the first time since 2020 according to Barclays.

In the U.S., once activists had a full proxy season to process the new UPC framework, we witnessed a deluge of campaign initiations. As a result, Q4 saw a significant uptick in the number of new campaigns initiated at U.S. companies compared to Q3. This flurry of activity included the announcement of high-profile repeat engagements by Trian Partners at Walt Disney and Elliott Management at Crown Castle.

Reflecting on over a full year of election contests under UPC, we can finally put to bed all the false narratives about how the rules would significantly reduce the costs of running a proxy contest and trigger an onslaught of campaigns by so-called “gadfly activists.” Instead, what we have actually seen under UPC is a greater appetite by boards and their advisers to reach cooperation agreements in the face of activists seeking to replace the most vulnerable, “weakest link” incumbents with highly qualified, specialized and diverse nominees. In the new UPC environment,

we also saw these settlements being reached much earlier in the negotiation process than in prior years.

Shareholder activists were pleased with the SEC's decision not to go "all-in" on its proposed overhaul of the beneficial ownership reporting regime, likely based on input from shareholder activists and other market participants that the proposed rules would subvert shareholder democracy. At the end of the day, the new rules were less transformative and more balanced than initially proposed. The deadline for filing an initial Schedule 13D was shortened to five business days (from the legacy 10 calendar days) after crossing the 5% ownership threshold or losing eligibility to report on Schedule 13G. The deadline for filing any required amendments to a Schedule 13D is now a more certain two business days (instead of "promptly") after a triggering "material change."

The SEC chose not to codify certain rules governing group activity, as originally proposed, that likely would have chilled shareholder communications that are vital for maintaining corporate democracy and free markets and instead issued guidance regarding the appropriate legal standard for determining when a group is formed. The SEC also stopped short of adopting substantive amendments on when to deem certain holders of cash-settled derivative securities as beneficial owners of the reference security, as originally proposed, that likely would have altered many activists' game plans for building their ownership positions and instead issued guidance on circumstances in which the reference security will be deemed to be beneficially owned.

While the SEC's guidance provides helpful insight, we believe that most seasoned activists had long ago incorporated the salient principles of group formation and swap-related beneficial ownership underpinning this guidance in the way they conduct their investment activities. We therefore do not expect the new guidance to materially alter the way these activists communicate with other shareholders or build their swap positions.

The adoption by many companies of amendments to their advance notice nomination bylaw provisions ("ANBs") making them more onerous than ever was a serious issue for activists in 2023. Even after the backlash endured by Masimo for attempting to weaponize its ANBs in the face of Politan's activist campaign, too many companies continued to take overly aggressive and often unlawful positions that nominations were invalid for purported failures to comply with the ANBs. A number of these situations led to litigation.

On this front, shareholder activists scored a monumental victory when the Delaware Chancery Court in *Kellner v. AIM ImmunoTech, Inc.* invalidated four of six amended ANBs, including the use of a troubling "stockholder associated persons" provision, for being "overbroad, unworkable, and ripe for subjective interpretation by the Board."

In rendering her opinion in *Kellner*, Vice Chancellor Will stated that this case “hints at what coming activism disputes may bring” – we could not agree more. While some companies will act responsibly by voluntarily remediating problematic language in their existing ANBs directly in response to *Kellner*, expect similar lawsuits to be filed in 2024 by shareholder activists seeking to enforce nominations rejected by entrenched boards for purported noncompliance with indecipherable and subjective ANBs.

In the same vein, in 2024 we would not be surprised to see shareholder activists be more proactive in shining a light on offensive ANBs right off the bat by incorporating business proposals into their nomination letters that seek to clean up or roll back these provisions as part of the annual meeting agenda.