

**“Activist Profiles & Playbooks”**

**Tuesday, February 6, 2024**

**Course Materials**

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**Tuesday, February 6, 2024**

2 to 3 p.m. Eastern [archive and transcript to follow]

2023 once again saw near record levels of shareholder activism and there’s no reason to expect that 2024 won’t bring more of the same. Activists’ strategies and tactics — and companies’ responses to them — continue to evolve. That makes it even more important for companies to understand who the activists are and what makes them tick.

Join these experts:

- **Juan Bonifacino**, Managing Director, Spotlight Advisors LLC
- **Anne Chapman**, Managing Director, Joele Frank
- **Sydney Isaacs**, Managing Director, H/Advisors Abernathy
- **Geoffrey Weinberg**, Managing Director, Morrow Sodali

Topics include:

- Lessons from 2023’s Activist Campaigns
- What to Expect from Activists This Proxy Season and How to Prepare
- Experience Under Universal Proxy in 2023 and Implications for 2024
- Evolution of Activist Strategies and Tactics

## **“Activist Profiles & Playbooks”**

### Course Outline/Notes

1. Lessons from 2023’s Activist Campaigns
2. What to Expect from Activists This Proxy Season and How to Prepare
3. Experience Under Universal Proxy in 2023 and Implications for 2024
4. Evolution of Activist Strategies and Tactics

## **“Activist Profiles & Playbooks”**

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**January 2, 2024**

## **Activism: Del. Chancery Scrutinizes Advance Notice Bylaw Amendments**

Following implementation of the SEC's universal proxy rules, disputes about activists' compliance with advance notice bylaws have become one of the [key battlegrounds](#) in proxy contests. Last week, in [Kellner v. AIM Immunotech](#), (Del. Ch.; 12/23), the Chancery Court addressed a challenge to amendments to a company's advance notice bylaw adopted during a proxy contest. Vice Chancellor Will upheld certain of those amendments & struck down others, but ultimately concluded that the board acted reasonably in rejecting the investors' notice of nominations for noncompliance with the advance notice bylaw.

There's an old adage that says the "politics makes strange bedfellows" and this case makes a strong argument that this adage applies equally to shareholder activism. The activists in this situation were an eclectic group comprised of a convicted felon, a former securities trader, a billionaire investor & minority owner of the Milwaukee Bucks, an investor relations consultant, and – I kid you not – the IR guy's surfing buddy.

The surfing buddy – who I can't help picturing as [Jeff Spicoli](#) from *Fast Times at Ridgemont High* – fronted the activists' efforts to submit a notice of nominations in 2022. The activist group's 2022 effort was poorly organized and chaotic, and the company successfully rejected its nominations. However, concerns about the group's efforts "to conceal who was supporting and who was funding the nomination efforts and to conceal the group's plans for the Company" & the likelihood of a 2023 proxy contest prompted the board to consult with its legal advisors and adopt amendments to the company's advance notice bylaws "to better protect AIM and its stockholders against potentially abusive and deceptive practices."

As expected, the activists took another run at the company in 2023 and submitted a notice of nominations under the terms of AIM's amended advance notice bylaw. The company rejected that notice, and the plaintiff brought a lawsuit seeking to hold the bylaw amendments invalid and compelling AIM to accept the activists' nominees. Citing the Delaware Supreme Court's recent decision in [Coster v. UIP Companies](#), (Del.; 7/23) and noting that the amendments were not adopted on a "clear day," Vice Chancellor Will evaluated the plaintiff's claims under the *Unocal* enhanced scrutiny standard.

She concluded that the board reasonably identified a threat to the proper corporate objectives that prompted it to adopt the bylaw amendments but held that most of those amended provisions were not proportionate responses to that threat. A total of six bylaw provisions were challenged by the plaintiff. The Vice Chancellor found that the following four provisions were invalid:

– [AAU Provision](#). The bylaw amendments included language requiring disclosure of all arrangements, agreements, or understandings ("AAUs"), "whether written or oral, and including promises," relating to a board nomination. The provision contained a 24-month lookback period for disclosure of AAUs, and it also contained language requiring disclosure of any AAUs involving persons acting in concert with a particular holder and any "Stockholder Associated Person" ("SAP"). While the Vice Chancellor was not troubled by the lookback provision, she found the

definition of SAP included in the bylaw to be unreasonably broad. She concluded that it rendered the AAU provision “overbroad, unworkable, and ripe for subjective interpretation” by AIM’s board.

– Consulting/Nomination Provision. The amendments also required disclosure of AAUs between the nominating holder or an SAP, on one hand, and any of its nominees, on the other, concerning “consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years.” Vice Chancellor Will concluded that the inclusion of SAPs created the same problems for this provision that it did for the AAU provision, and she also said that it imposed “ambiguous requirements across a lengthy term.” Ultimately, she concluded that the provision “would give the Board license to reject a notice based on a subjective interpretation of the provision’s imprecise terms” and was invalid.

– Known Supporter Provision. The amendments included language requiring the nominating stockholder and nominees to list all known supporters as part of the notice. The defendants justified this provision by noting that the Chancery Court had previously upheld language in an advance notice bylaw requiring disclosure of known financial supporters. The Vice Chancellor was unpersuaded by that argument. She concluded that by adopting a provision that applied ambiguously to “all known supporters,” the board could take a broad reading of the provision and reject the nomination for reasons that a stockholder couldn’t realistically anticipate.

– Ownership Provision. The amendments required a nominating stockholder to disclose, among the holder’s interest in AIM stock, including shares beneficially owned and synthetic, derivative, and short positions in the stock. That disclosure requirement extended to SAPs, immediate family members, and persons acting in concert with a nominee. While observing that disclosure of this nature was “perfectly legitimate” in principle, Vice Chancellor Will found the bylaw language itself to be “indecipherable” and concluded that it “sprawled wildly” beyond that legitimate purpose. She concluded that “the provision seems designed to preclude a proxy contest for no good reason.”

The Vice Chancellor upheld the other two provisions of the bylaw amendments challenged by the plaintiff. Those involved a requirement to disclose the dates of first contact among those involved in the nomination effort, which she concluded was a reasonable approach to the objective of eliciting sufficient information “for the Board to make a recommendation about the nominations and stockholders to cast informed votes.” She also upheld the bylaw’s requirement that the nominees complete D&O questionnaires.

Despite tossing several of the bylaw amendments, the Vice Chancellor ultimately upheld the board’s decision to reject the activists’ nominations on the basis of their noncompliance with several valid requirements set forth in the advance notice bylaws. She also concluded that the remedy of rejecting the nominations was reasonable and proportionate under the circumstances.

– **John Jenkins**

Posted by John Jenkins

Permalink: <https://www.deallawyers.com/blog/2024/01/activism-del-chancery-scrutinizes-advance-notice-bylaw-amendments.html>

[← Handling Equity Awards in M&A Transactions](#) | [Main](#) | [Managing Conflicts: Lessons from Recent Litigation](#) →

**December 4, 2023**

## **Is the SBUX Proxy Contest a Sign of Things to Come?**

I'm sure you've already heard about the Starbucks proxy contest led by the Strategic Organizing Center, a coalition of labor unions, including the Service Employees International Union (SEIU). If not, this [Wall Street Journal article](#) discusses the coalition's concerns and its three nominees. The article notes that the coalition has submitted shareholder proposals in the past, but this is the first time it has launched a proxy contest. It makes only a brief reference to universal proxy — noting that UPC could benefit the coalition.

But others have expanded on this point. Michael Levin at The Activist Investor has called this “[the first ESG proxy contest under UPC](#).” And, while this [Paul Hastings alert](#) is cautious about extrapolating too much from one contest, it says this might be early evidence that some of the corporate world's concerns about UPC are coming to fruition:

Some corporate observers recognized the possibility that universal proxy would enable and encourage labor unions and other single-agenda activists to hijack the director election process as a means to advance their agenda and extract management concessions. SEC representatives, universal proxy supporters and some corporate advisors dismissed the idea as fear mongering, and were quick to seize on the lack of comparable campaigns during the 2023 proxy season as clear and irrefutable evidence that such fears were unwarranted [but] [t]he SEIU campaign should remind corporations that the full implications of the universal proxy card cannot be assessed after a single proxy season. We would expect similar campaigns organized by labor and other interest groups will occur in the coming proxy seasons.

The alert explains how UPC has made using “the annual shareholder meeting process as a very public platform to pressure corporate management and advance their agendas” more attractive to activists:

The fact is that these nominal contests by single-agenda activists can be conducted inexpensively with the activist mostly freeriding on the company's proxy solicitation efforts. The universal proxy rules require that a dissident solicit shareholders representing at least 67% of the voting power of shares entitled to vote on the election of directors. While the SEC Staff has made clear through interpretive guidance that merely filing a proxy statement on EDGAR is not sufficient to meet the 67% solicitation requirement, according to the SEC's adopting release, these solicitation costs even at a mega-cap company would be less than \$10,000. Further, based on publicly available data from FactSet, we estimate that the SEIU would have to mail proxy materials or provide electronic access through e-proxy procedures to less than 300 Starbucks shareholders to meet the 67% solicitation requirement.

[...] In addition to lowering the campaign cost for a dissident group, the inclusion of the dissident's nominees on the management proxy card is likely to increase the chances that shareholders elect at least one of the three SEIU nominees.

What's a board to do? The alert makes some recommendations. One cites a workers' rights proposal that received support from a majority of shareholders at the 2023 annual meeting, and suggests companies closely consider voting results on shareholder proposals and, where a proposal garners significant support, proactively engage with shareholders "to make sure [the board is] responding to the concerns that caused shareholders to vote in favor of such proposal."

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/12/is-the-sbux-proxy-contest-a-sign-of-things-to-come.html>



[← Earnouts: Delaware Courts More Often Siding with Sellers | Main | Amending the DGCL to Authorize ConEd Clauses? →](#)

November 21, 2023

## **Corp Fin Staff Offers New Guidance on Universal Proxy, Rule 14a-12 and Schedule 14A**

Yesterday, on [TheCorporateCounsel.net blog](#), Dave shared that the Corp Fin Staff issued one revised and five new [Proxy Rules and Schedule 14A Compliance and Disclosure Interpretations](#) last Friday. In multiple blogs, Dave included the full text of the CDIs, grouped by topic. Here's a quick summary of each CDI, with links to Dave's blogs for more:

### [Preliminary Proxy Statements](#)

**Question 126.03:** This existing CDI regarding counting the 10 calendar days for Rule 14a-6 was amended to clarify that the explanation in the interpretation assumes that the preliminary proxy statement is submitted before 5:30 pm Eastern and receives the submission date as the EDGAR filing date.

### [Universal Proxy Cards](#)

**Questions 139.07 to 139.09:** These new CDIs clarify the treatment for overvoted, undervoted and signed but unmarked universal proxy cards under Rules 14a-4 and 14a-19.

– In the case of an overvoted proxy card, which cannot be voted in accordance with the shareholder's specifications, a soliciting party cannot rely on discretionary authority to vote the shares represented by the overvoted proxy card on the election of directors. The shares can be counted for purposes of determining a quorum and can be voted on other matters on the proxy card for which there is no overvote.

– In the case of an undervoted proxy card, the shareholder has specified its choices for the election of directors, and a soliciting party cannot rely on discretionary authority to vote the shares represented by the undervoted proxy card for the remaining seats.

– As long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified, a soliciting party can use discretionary authority to vote shares represented by a signed but unmarked proxy card in accordance with the party's voting recommendations because the shareholder has not specified any choices.

### [Solicitations Before the Furnishing of a Proxy Statement and When a Proposal "Involves" Another Matter](#)

**Question 132.03:** A soliciting party can't satisfy Rule 14a-12(a)(1)(i) through a legend that only includes a general reference to filings made by the soliciting party or the participants since general references don't sufficiently advise shareholders where they can obtain participant information. Legends must clearly identify the specific filings including by filing date, the specific locations of the participant information in the filings by section headings or captions and include active hyperlinks when possible.

**Question 151.02:** When an acquisition doesn't require shareholder approval but the registrant seeks approval for the authorization of additional shares that may be issued upon the conversion of the securities issued in the acquisition, the registrant would have to include information about the acquisition called for by Schedule 14A in the proxy statement because authorization of additional shares is necessary to meet its obligation under the convertible securities issued as consideration.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/11/corp-fin-staff-offers-new-guidance-on-universal-proxy-rule-14a-12-and-schedule-14a.html>

[← More Companies Facing Multiactivist “Swarms”](#) | [Main](#) | [Healthcare Transactions: States Enact “Mini-HSR” Acts](#) →

**September 12, 2023**

## **Playing By the Rules: How Advance Notice Bylaws Are Paying Off**

Here’s something Liz [shared](#) last week on TheCorporateCounsel.net blog:

We cover a lot of “shareholder activism” developments over on DealLawyers.com, and last week, Meredith [blogged](#) about a recent Delaware case that came down in favor of a company that relied on an advance notice bylaw to reject a dissident nominee. This [MoFo memo](#) says that case is part of a broader trend of companies being sticklers for compliance with “advance notice” provisions. In the past 18 months, 17 companies rejected dissident director nominations for failure to comply with advance notice bylaws – and Delaware courts are tending to uphold those decisions.

The memo urges companies to make sure that their advance notice bylaws incorporate the latest protective features, without going so far that the bylaw will be struck down when it’s enforced. This excerpt outlines what to consider when you’re dealing with these provisions:

- Review the company’s bylaws and, in particular, advance notice provisions regularly. The recent introduction of the “universal proxy card” provides a good point of departure for a bylaw review, if one has not been undertaken already.
- Adopt any changes to the advance notice bylaws on a “clear day,” if possible, i.e., before any dissident stockholder surfaces.
- Advance notice bylaws should be clear and unambiguous, as any ambiguity or lack of clarity may be resolved in favor of the dissident.
- The board must act reasonably when it considers whether a stockholder nomination complied with the advance notice bylaws. “Inequitable acts towards stockholders do not become permissible because they are legally possible.”
- Advance notice bylaws should be in line with market standards. Courts see standard advance notice bylaws as commonplace and as serving a legitimate purpose. However, if they are overly aggressive or burdensome compared to market standards, they may be subject to challenge.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/09/playing-by-the-rules-how-advance-notice-bylaws-are-paying-off.html>

[← Del. Chancery Declines to Award Specific Performance in DeSPAC Merger Fight | Main | Playing By the Rules: How Advance Notice Bylaws Are Paying Off →](#)

**September 11, 2023**

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## **More Companies Facing Multiactivist “Swarms”**

This recent Sullivan & Cromwell publication, [2023 Corporate Governance Developments](#), gives an excellent overview of Board and Committee agenda topics that are relevant right now. On activism-related developments, it highlights this challenging trend:

Large-cap companies are increasingly being targeted by multiple activists at the same time (referred to as a “swarm”). According to data from Lazard (available [here](#)), 13% of all companies targeted by an activist campaign during Q1 2023 were subjected to multiple new campaigns that were launched within the same quarter.

Swarms will intensify the challenges posed by an activist campaign as the target company will need to engage simultaneously with different funds that have varying time horizons and potentially competing objectives.

The alert notes that providing clear and consistent messaging to shareholders and activists about your strategy and business is key whether you’re dealing with a single campaign or a swarm with different objectives. John has also [blogged](#) about the importance, in light of this trend, of thinking critically and objectively about your vulnerabilities and taking steps to address them.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/09/more-companies-facing-multiactivist-swarms.html>

[← Integration Issues: Address Employment Considerations Early | Main | Advance Notice Bylaws: High Bar to Show “Radical Shift” for Reopening of Window →](#)

**August 31, 2023**

## **Fiduciary Duties When Settling with Activists**

Gibson Dunn recently published its [2022 Activism Update](#). The report gives detailed information about individual activist campaigns & settlements and some summary stats, like this one related to settlement agreements:

23 settlement agreements pertaining to shareholder activism activity were filed during 2022, which is an increase from the 17 filed in 2021. Those settlement agreements that were filed had many of the same features noted in prior reviews, including voting agreements and standstill periods as well as non-disparagement covenants and minimum-share ownership and/or maximum-share ownership covenants. Expense reimbursement provisions were included in less than half of those agreements reviewed, which is a decrease from previous years.

Potentially due to some UPC-related activism anxiety, this trend seems to have continued [in 2023](#). With this in mind, the reminder in this recent [post](#) from the Milbank General Counsel Blog about fiduciary duties when settling an actual or threatened proxy fight seems particularly timely.

Boards often settle actual or threatened proxy fights by trading away board seats to activists. Delaware courts will analyze this trade as a defensive device, much like greenmail, where the board trades away something valuable to avoid a battle for corporate control. It follows that, like greenmail or a poison pill, this defensive device would be subject to scrutiny under the *Unocal* standard. Yet boards in general seem to be remarkably lax in analyzing whether they have fulfilled their fiduciary duties in making such a trade.

On the application of *Unocal*, the blog notes that: “settlement of a proxy fight would seem to necessarily involve the stockholder franchise, and, accordingly, be subject to review under *Blasius*. However, *Blasius* review has recently been “folded into *Unocal* review to achieve the same ends,” citing the recent Delaware Supreme Court opinion in [Coster v. UIP Companies](#), (Del.; 6/23), which John has [blogged](#) about [twice](#). In light of fiduciary duty considerations and potential for *Unocal* scrutiny, the post then reviews the following key questions boards should ask and answer before awarding one or more board seats to an activist, discussing each:

Has the board identified a cognizable threat?

Is giving away board seats reasonable in relation to the identified threat?

What is the nominee’s relationship with the activist (including alignment on agenda and ongoing communications)?

What is the activist’s agenda?

Finally, the blog argues for improved disclosure around activist settlements, especially on what the settlement means for the company — what the company gained, what threat was neutralized and why settling for a board seat was preferable to allowing a vote.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/08/fiduciary-duties-when-settling-with-activists.html>

[← Del. Chancery Pours Cold Water on Mootness Fees for Disclosure Claims](#) | [Main](#) | [Antitrust: DOJ & FTC Issue Draft Merger Guidelines](#) →

**July 19, 2023**

## **Universal Proxy: Where are We After One Year?**

With the first anniversary of the effective date of the universal proxy rules fast approaching, commentators are starting to provide some thoughts on the extent to which the rules have – or haven’t – changed the activism landscape. This introduction to a recent [Sidley article](#) in *Directors & Boards* provides an overview of the changes resulting from the universal proxy rules:

The universal proxy rules, which went into effect on September 1, 2022, have shifted the landscape of shareholder activism by allowing shareholders to “mix and match” their votes across proxy cards in contested elections. Since September, the move to candidate-based (rather than slate-based) voting has encouraged activists to nominate smaller, more targeted slates, and the added leverage in settlement negotiations has ultimately resulted in activists winning a larger number of board seats.

In addition, mega-cap companies in the United States have been targeted more than ever before, despite a modest decline in total campaigns, with some companies becoming targets of the growing “swarming” phenomenon, whereby multiple activists target a vulnerable company concurrently or in rapid succession.

The article says that in this heightened threat environment, boards can benefit from an effort to “think like an activist” by thinking critically and objectively about their vulnerabilities and taking steps to address them. As I’ve [previously blogged](#), that’s a strategy that seems to have paid dividends for companies.

By the way, Michael Levin at [The Activist Investor](#) is putting together a webcast called “Universal Proxy Card After One Year.” The program features [Prof. Slava Fos](#) of Boston College and [Abbott Cooper](#), Managing Member of Driver Management Company LLC. It will be held on Wednesday, July 26th from 10:00 am to 11:15 am eastern. The webcast is free and you can [register for it here](#). I attended Michael’s program on UPC last year and found it very informative. I plan on attending this one as well.

– **John Jenkins**

Posted by John Jenkins

Permalink: <https://www.deallawyers.com/blog/2023/07/universal-proxy-where-are-we-after-one-year.html>

[← The Latest Analysis of Top 40 Activists | Main | Extensive Changes to HSR Premerger Notification Form Proposed →](#)

**June 28, 2023**

## **The Stats on the First Season of UPC**

Leading up to the 2023 proxy season, there was much debate about how universal proxy would change the game. With a more level playing field and possibly lower costs, would companies see a spike in activism? In this [M&A update](#), Kirkland analyzed all of the activist campaigns at US-listed companies from September 1, 2022 through June 16, 2023 and compared the data to prior periods. As detailed further below in the key takeaways from the article, UPC did not result in a significant spike in activism in the 2023 season — its impact was more nuanced:

- Activity levels: Activism levels remained high, but fewer campaigns resulted in proxy fights while more settled
- Target size: Activism campaigns targeted companies of all sizes, but the vast majority of proxy fights occurred at smaller companies
- Number of nominees: Activists did not nominate more candidates per slate
- Proxy fight costs: While universal proxy theoretically lowered the cost of entry for an activist, proxy fight costs did not come down and there was no surge in bare-bones campaigns
- Proxy advisor recommendations: While ISS and Glass Lewis continue to require that activists make a case for change, they are placing greater emphasis on individual director qualifications
- Litigation: In a highly litigious proxy season, companies challenged the validity of activist nominations at unprecedented levels
- Success level: Universal proxy may be increasing the odds of at least some activist success, but it has not opened the floodgates

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/06/the-stats-on-the-first-season-of-upc.html>



[← UK Antitrust Scrutiny of Roll-up Acquisitions | Main | M&A Agreements: Seller's Breach of Capitalization Rep Gives Buyer Right to Walk →](#)

**June 2, 2023**

## **Findings from New Shareholder Activism Study**

In an [HLS blog post](#), Goldman Sachs presents findings from a recent analysis of activism against Russell 3000 companies with campaigns launched from 2006 to the first quarter of 2023. The analysis was conducted to better understand what changes activists seek, what metrics suggest company vulnerability and how a company's stock price performs after a campaign. Here are some of the key findings relating to vulnerability and activist agendas:

We identify four metrics relative to the sector median that are associated with an increased likelihood of becoming an activist target: (1) slower trailing sales growth, (2) lower trailing EV/sales multiple, (3) weaker trailing net margin, and (4) trailing 2-year underperformance. Note that low realized sales growth relative to the sector median is the metric most associated with a target company's share price outperformance following the launch of an activist campaign.

...The most frequent activist investor demand involved in 28% of campaigns since 2006 has been for companies to separate its business. Other common demands include (1) review strategic alternatives (19%), (2) return cash to shareholders (12%), (3) block a proposed merger or acquisition (12%), (4) become a target of a potential acquisition (10%), and (5) increase or decrease leverage (7%).

While the pace of activist campaigns surged in 2022 and moderated in 2023 to date, the post identified one changing trend that may be related to universal proxy – or at least companies' fear of its potential consequences:

One interesting development in 2023 has been the speed of capitulation by management teams. In several high profile attacks, companies have announced their intention to implement several of the actions proposed or advocated by activists, thereby nullifying the need for those investors to continue to agitate for change.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.deallawyers.com/blog/2023/06/findings-from-new-shareholder-activism-study.html>

[← Blog Email Address Changeover: It's DealLawyers.com's Turn!](#) | [Main](#) | [Private Equity: Managing Valuation Gaps in a Tough Market](#) →

**April 14, 2023**

## **Activism: Occasional Activists Move to Center Stage**

Like a lot of other investors, traditional activist hedge funds had a tough year last year. This [Morrison & Foerster memo](#) says that the sector was down 17% 2022, after posting positive returns of 16% and 10% during the prior two years. Activists also struggled at the ballot box, winning less than half of the proxy contests that went to a vote last year. The memo doesn't suggest that these setbacks will result in activist hedge funds abandoning their strategy, but it does speculate that so-called "occasional activists" may play a more prominent role in future activist campaigns. This excerpt explains:

Taking the place of these dedicated activists are "occasional activists" like institutional investors and individuals, including company insiders. As institutional investors have grown in size, they have become major shareholders in many companies, giving them a significant voice in corporate decision-making and greater leverage to push for changes they believe will benefit both the company and its shareholders.

At the same time, the rise of online trading platforms and social media has made it easier for individuals to organize and advocate for changes in the companies they invest in. Directors and officers of publicly traded companies who are typically seen as being aligned with the interests of the company's management, have also become more vocal in their efforts to push for changes that they believe will benefit the company and its shareholders.

The memo goes on to list some campaigns undertaken over the past 3 years in which institutional investors or individuals played a prominent role. Last year's list includes the unusual [proxy contest](#) between the CEO of Aerojet Rocketdyne and the company's Executive Chairman, which saw the CEO's slate of directors prevail with 75% of the vote.

– **John Jenkins**

Posted by John Jenkins

Permalink: <https://www.deallawyers.com/blog/2023/04/activism-occasional-activists-move-to-center-stage.html>

[← UPC CDIs: Do they Make Space for a Current Activist Strategy? | Main | Mindbody: Target's CEO & Buyer Liable for \\$44 Million in Damages →](#)

**March 20, 2023**

## **Tender Offers: SEC Builds Out Tender Offer Rules & Schedules CDIs**

On Friday, Corp Fin finished its long-awaited build-out of the Tender Offer Rules & Schedules CDIs by [issuing 34 CDIs](#) addressing a wide range of interpretive issues. As anyone who's ever researched tender offers knows, most of the Staff's guidance has been scattered across the old Telephone Interps & other locations on the SEC's website, with only a handful of topics addressed in the CDIs. All of that guidance has finally been consolidated into a single location. The intro to the page provides some insight into where all of the new CDIs came from:

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the tender offer rules. Many of the C&DIs replace the interpretations previously published in the Tender Offer Rules and Schedules Manual of Publicly Available Telephone Interpretations, Excerpt from November 2000 Current Issues Outline, and Excerpt from March 2001 Quarterly Update to Current Issues Outline (namely, C&DIs 101.05 through 101.16; 104.01; 104.02; 130.01 through 130.03; 131.01 through 131.03; 144.01; 146.01; 149.01; 158.01; 161.01; 162.06; 162.07; 163.01; 164.01; and 181.01). C&DI 101.04 replaces Question 2 in the Schedule TO section of the July 2001 Interim Supplement to Publicly Available Telephone Interpretations.

As this [Gibson Dunn blog](#) points out, there's not a lot that's new here in terms of substantive guidance. Still, there's so much that's new to this page on the SEC's website that I think you may find [this version](#) that I dug up from the Internet Archive showing what the page looked like before Friday's changes helpful. Members of DealLawyers.com can also access this [redlined copy](#) of the CDIs that I posted in our "[Tender Offers](#)" Practice Area.

By the way, I know that many of our readers will be in attendance at the [Tulane Corporate Law Institute](#) later this week. I'll be there as well and hope to have a chance to meet you during the conference. I'm easy to find – just look for a guy who appears to be a cross between [Butterbean](#) & [Sir Topham Hatt](#)!

– **John Jenkins**

Posted by John Jenkins

Permalink: <https://www.deallawyers.com/blog/2023/03/tender-offers-sec-builds-out-tender-offer-rules-schedules-cdis.html>

# DEAL LAWYERS

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DIRECT FROM THE EXPERTS FOR 45 YEARS

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JULY-AUGUST 2023

## The Universal Proxy Card: Transforming Board Elections and Activism

**By Edward Greene, Managing Director,  
Georgeson**

The 2023 AGM Season has provided valuable insights into the changing dynamics of board elections as a result of the Universal Proxy Cards (“UPCs”).

The UPC’s introduction of “mix-and-match” ballots in contested elections has allowed shareholders to choose individual nominees from either management or dissident slates, transforming voting behavior and campaign strategies. While the long-term implications are yet to be fully understood, initial data indicate noticeable effects on voting patterns, campaign dynamics and individual director quality, the latter of which has received heightened attention.

Companies of all sizes, but mostly smaller firms, felt the impact of activism campaigns. During the last three proxy seasons (2021–2023), the number of “high impact” activism campaigns — where activists seek board control, board representation or removal of officers to maximize shareholder value — has remained roughly consistent across the market cap spectrum; however, smaller companies (sub-\$2 billion market cap) saw nearly 80% of U.S. proxy fights during the 2023 season, according to Factset.

### Trends in Board Seat Campaigns

During the 2023 AGM proxy season, there were 38 campaigns for board representation or control at Russell 3000 companies, a marginal decrease from the previous season’s 41. The proportion of campaigns that progressed to contested meetings declined, however, from 39% to 29%.

The number of campaign withdrawals also decreased while the number of settlements or concessions rose, suggesting that activists achieved greater success in achieving their objectives: 47% of campaigns resulted in activists gaining at least one board seat compared to 34% during the previous season. Such numbers do not, however, account for campaigns that did not become public.

### The Impact of ‘Mix-and-Match’ Voting

Historically, “split” results in board elections — where shareholders elect some but not all nominees from a dissident slate — are rare. The presence of three such split-result meetings during 2023 indicated a significant proportional increase compared with previous years. The last decade saw none or one split vote each proxy year. This tripling rate rise prompts questions about the strength of individual nominees within

slates and also emphasizes the importance of individual director quality for securing shareholder support.

During previous years, weaker nominees benefitted from shareholder support based on their affiliation with a stronger colleague within the slate.

Although the introduction of UPC raises the issue of whether weaker dissidents or management nominees have historically benefited from shareholder support for their stronger colleagues, individual directors' quality, skills and performance are now crucial factors in determining election support. Moreover, the requirement of UPC that directors demonstrate their value individually, irrespective of slate affiliation, could result in fewer total wins, leading to an increase in settlements, concessions and split-result victories.

### **Individual Investor as Activist**

Activists, including individual investors, can launch a campaign targeting a single director seat or more as a result of UPC.

There has already been an occasion where an individual investor with only a 2% stake in the company won three board seats despite a lack of support from either popular shareholder advisory firm.

This year, a first-time individual investor-turned-activist swayed sentiment against the board and management by launching an active social media engagement campaign targeting the company's large retail shareholder base. Although this is an example of how a small shareholder can have a big impact, it's likely not the norm.

### **Mitigating Director Risk and Strengthening Board Composition**

To mitigate risks from activist investors and navigate the UPC landscape effectively, boards can implement the following measures:

- Conduct a thorough assessment of board and individual director vulnerabilities while also benchmarking skills and composition against industry peers.
- Maintain ongoing engagement with institutional investors to signal that the company is actively overseeing risk and also to counter potential activist portrayals of director entrenchment or disengagement.

### **Anticipating Future Trends**

Looking to the future, several factors may drive an increase in challenges that may alter UPC dynamics, including "first-year jitters" among companies and activists, a heightened focus on individual director vulnerabilities and a perception that UPC increases the likelihood of activist victories in proxy fights. Other factors unrelated to UPC include the adoption of modernized advance notice bylaws, boards enforcing stricter compliance with these bylaws and less experienced activists submitting incomplete or misleading nomination notices.

In summary, during UPC's first year in practice, the new rules have brought significant changes to board elections and shareholder activism. With its focus on individual directors' quality and increased activist campaign success rates, UPC's influence is undeniable.

While there was no significant reduction in campaign costs for activists, companies and their boards will likely face more challenging proxy fights. Boards must proactively address activism risks and strengthen governance practices to navigate the evolving landscape shaped by UPC.

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