



### 8 Hot Topics in Activism

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**Editor's note:** [Tiffany F. Campion](#) is a Senior Attorney, and [Christopher R. Drewry](#) and [Joshua M. Dubofsky](#) are Global Co-Chairs of the Shareholder Activism & Takeover Defense Practice at Latham & Watkins LLP. This post was prepared for the Forum by Ms. Campion, Mr. Drewry, and Mr. Dubofsky. 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.

As stockholder activists wind up for a new proxy season, prepared companies stay ready to respond to the first indication of activist interest by identifying their activism defense teams, updating their “break glass” memos, and considering the following hot topics for 2024:

#### **Next-Gen Advance Notice Bylaws**

Over 60% of the S&P 500 have amended their bylaws to address the universal proxy rules, often adopting other advance notice enhancements simultaneously. However, while recent Delaware litigation has continued to uphold a board's enforcement of advance notice bylaws, it also called into question the enforceability of certain disclosure requirements and the appropriate scope of entities making disclosures (e.g., *Kellner v. AIM ImmunoTech Inc., et al.*, C.A. No. 2023-0879-LWW (Del. Ch. Dec. 28, 2023)). There also has been an uptick in Delaware books and records demands regarding certain bylaw provisions. Companies must balance adopting provisions that provide beneficial information while being informed of the potential backlash through litigation, activist PR response (e.g., Crown Castle) or shareholder proposals.

#### **M&A and Activism**

As deal volume slowed in 2023, activism persisted at elevated levels globally. Despite a bumpy M&A environment and economic uncertainties, activists still sought for companies to review strategic alternatives, divest business units, consider unsolicited offers, or otherwise instigate M&A. In addition, M&A often faced activist scrutiny immediately post-announcement, underscoring the importance of preparing the board and management for this eventuality.

## **UPC Technicalities**

In the second season of universal proxy cards (UPCs), activists and issuers continue to navigate the developing risks, tactics, and logistics of a proxy fight with a UPC, including the multiparty proxy fight at Disney. Each contest brings outcome-determinative procedural issues to light, such as MindMed retaining broker discretionary authority for shareholders who did not receive activist proxy materials, emphasizing the importance of engaging seasoned advocates deeply familiar with the new UPC rules and associated technicalities.

## **Single-Issue Campaigns**

While the 2023 proxy season did not see a tsunami of single-issue activists as some feared, the future viability of these campaigns may be dramatically influenced by the Strategic Organizing Center's (SOC's) current campaign at Starbucks focused on human capital management. Investors may be receptive to future campaigns if the SOC can successfully demonstrate the influence of labor issues on stockholder value.

## **13D Reporting Deadline Shortened**

On February 5, 2024, the SEC's shortened deadlines for Schedule 13D and 13G beneficial ownership filings took effect (e.g., reporting must take place within five business days, instead of 10 calendar days). As a result, activists must be even quicker off the mark. Companies can capitalize on this new dynamic by staying informed about changes in their stockholder bases and being ready to respond at the first indication of activist activity.

## **Stockholder Engagement**

While UPCs have not drastically changed the profile of activist campaigns, a variety of investors utilize activist tactics to drive stockholder value, including established, well-known funds, newly established groups, occasional activists, or other special interests. It is essential for companies to understand evolving investor expectations and how they engage with these stockholders and align support while executing the company's long-range plan.

## **ESG Outcomes**

While there is less public discourse on ESG matters compared to prior years, companies should still be ready to withstand activists on both sides of ESG matters by proactively assessing their disclosures and communication around their ESG profile and existing policies. Definitive guidance from the SEC on climate disclosure rules is expected in 2024.

### **Proxy Advisors' Influence**

As anticipated, UPCs encourage targeting specific directors for removal, which leads to direct comparisons of candidate quality and fit. In situations where proxy advisory firms have determined that the activist has made a case for change, they are more apt to support a new candidate that brings diversity and relevant expertise to a board, and that support is often pivotal in contested elections. Boards can reduce potential risk by committing to a regular refreshment process.