Session 303 | Barbarians at the (Universal Proxy) Gate: Shareholder Activism & How Companies Can Prepare

During the 2023 proxy season, shareholder activism levels surged to pre-pandemic record highs, with activist investors flexing their muscle to target U.S. companies of all sizes (including brand names like Disney and Salesforce). Significant turbulence in the market created opportunities for activists to amass sizable stakes ahead of making demands, and the economic environment exposed more company vulnerabilities for activists to exploit. Adding fuel to the fire, the SEC’s universal proxy rules took effect for shareholder meetings involving contested director elections, further tipping the scales in favor of activists. And in the midst of all of this, companies and activists continue to focus on the tension between competing ESG and anti-ESG forces.

This timely program will provide practical guidance for in-house lawyers and outside counsel alike for navigating these game-changing developments in shareholder activism, featuring insights from one of the most incisive financial journalists on Wall Street, the global chief legal officer of a Fortune 500 company and two of the market’s leading investment banking and legal experts in shareholder activism defense. This panel will arm you with a number of tangible tools to prepare for and strengthen your company or your client’s response to the rapidly evolving shareholder activism environment.

Moderator:
Sujeet Indap, Wall Street Editor, The Financial Times

Speakers:
Alan K. Tse, Global Chief Legal Officer and Corporate Secretary, Jones Lang LaSalle, Inc.
Gloria Lin, Managing Director (Shareholder Activism and Raid Defense), Evercore
Shaun J. Mathew, P.C., Partner (Shareholder Activism and Hostile Takeover Defense), Kirkland & Ellis LLP
Barbarians at the (Universal Proxy) Gate: Shareholder Activism & How Companies Can Prepare

#NAPABA23
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Shareholder Activism Developments
Executive Summary

► Shareholder activism levels generally back to pre-pandemic highs
   – Depressed valuations create buying opportunity for activists, and increased volatility also creating opportunities for activists to amass sizable stakes ahead of making demands
   – Current economic environment may expose more company vulnerabilities for activists to exploit
   – Activist activity levels remain high at companies of all sizes – while headlines focus on larger caps (Disney/Trian; Salesforce/Elliott, Starboard, ValueAct, Third Point), the vast majority of campaigns occur in smaller cap space
   – Activists increasingly pushing for CEO terminations
   – Continued trend of activists both pushing for M&A and making bids themselves
   – ESG continues to be a focus, but companies now face tension between pro-ESG and anti-ESG groups

► Universal proxy rules are now in effect for contested annual meetings, and early lessons from first proxy season under new regime include:
   – Far fewer proxy fights and more settlements, owing at least in part to uncertainty around voting dynamics and greater focus on individual director vulnerabilities
   – ISS and Glass Lewis have each used the universal proxy card to “split the ticket”
   – Lower cost of entry may have encouraged a few inexperienced first-time players (including single-issue non-economic actors) to attempt to launch contests, although not as frequently as many predicted

► Both strategics and financial sponsors are more regularly making unsolicited M&A approaches
   – Bidders continue to benefit from, and sometimes work with, activists to catalyze M&A activity (particularly with targets who may be less open to selling at current prices)
“Celebrity” Activists Dominate Headlines, But Most Activism Conducted By Smaller Funds (Including Many Fund Spin-Offs)

<table>
<thead>
<tr>
<th>CELEBRITY ACTIVISTS</th>
<th>FUND SPIN-OFFS</th>
<th>SELECT CAMPAIGNS BY FUND SPIN-OFFS</th>
</tr>
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<tbody>
<tr>
<td>ELLIOTT</td>
<td>LIONPOINT</td>
<td>BARNES, News Corp, Masimo</td>
</tr>
<tr>
<td>ICahn Enterprises L.P.</td>
<td>CORVEX MANAGEMENT</td>
<td>AMARIN, naplan, Algonquin</td>
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<td>JANA</td>
<td>PALLISER</td>
<td>ALGONQUIN POWER &amp; UTILITY CORP, Alkermes</td>
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<td>PAUSING SQUARE CAPITAL MANAGEMENT</td>
<td>ENGINE NO.</td>
<td>EXxonMobil</td>
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<tr>
<td>THIRD POINT</td>
<td>SACHEM HEAD</td>
<td>Banco, CSX, Dollar Tree, Aramark</td>
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<td>VALUE Act Capital</td>
<td>MANTLE RIDGE</td>
<td>Evolent Health, New Relic, Quotient</td>
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<tr>
<td>STARBOARD VALUE</td>
<td>LTS One</td>
<td>Bath &amp; Body Works, Ingevity, Salesforce</td>
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<tr>
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<td>NAPABA 35 YEARS OF LEADING and UNITING the AAPI COMMUNITY INDIANAPOLIS, INDIANA</td>
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#NAPABA23
Activists Have a Major Impact on CEO Turnover

A new study published by Strategic Governance Advisors indicates that an activist on the board doubles the likelihood of a CEO departure.

When activists obtained board seats at Russell 3000 companies, the rate of CEO change over the subsequent two years more than doubled:

- In 2021, post-activism CEO turnover reached a high of 56% compared to 21% in the normal course of business on a rolling 2-year basis.
- Even when the activist does not win board seats, the CEO turnover rate increases materially, to a rate in the low- to mid-30’s on a 2-year rolling basis.

While activists do not frequently campaign explicitly for CEO change, data suggests that once on the board, activists take more direct approach to achieving that end:

- Among the most aggressive activists with at least 5 campaigns in the sample, rates of near-term CEO change ranged from 42% for Elliott to as high as 75% for Engaged Capital.

Shareholder activism – even if “unsuccessful,” but particularly when it results in an activist gaining board seats – can have significant implications for company leadership:

- Boards need to consider these implications in communicating to investors and developing a strategy for responding to activism.

*Percentage of public campaigns from 2018 - present which resulted in CEO turnover within 2 years of public launch

**Average market cap for the target companies of all campaigns launched

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<table>
<thead>
<tr>
<th>Activists</th>
<th>Campaigns Launched</th>
<th>CEOs Ousted</th>
<th>Rate* (%)</th>
<th>Avg Mkt Cap (SB)**</th>
</tr>
</thead>
<tbody>
<tr>
<td>STARBOARD VALUE</td>
<td>34</td>
<td>12</td>
<td>35.3%</td>
<td>$13.6</td>
</tr>
<tr>
<td>ELLIOTT</td>
<td>31</td>
<td>13</td>
<td>41.9%</td>
<td>$29.7</td>
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<tr>
<td>LAND and BUILDINGS</td>
<td>19</td>
<td>6</td>
<td>31.6%</td>
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<tr>
<td>KAHN ENTERPRISES</td>
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<td>$24.8</td>
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<tr>
<td>ValueAct Capital</td>
<td>15</td>
<td>3</td>
<td>20.0%</td>
<td>$32.4</td>
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</table>
How Has Universal Proxy Impacted Activism in 2023?

Key observations from the first proxy season under the new universal proxy regime include:

A. **Activity levels:** Activism levels remained high, but fewer campaigns resulted in proxy fights while more settled.

B. **Target size:** Activist campaigns targeted companies of all sizes, but the vast majority of proxy fights occurred at smaller companies.

C. **Number of nominees:** Activists did not nominate more candidates per slate.

D. **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.

E. **Proxy advisor recommendations:** While ISS and Glass Lewis continue to require that activists make a case for change, they are placing greater emphasis on each individual director’s qualifications.

F. **Litigation:** In a highly litigious proxy season, companies challenged the validity of activist’s nominations far more often than ever before.

G. **Success level:** Universal proxy may be increasing the odds of at least some activist success, but it has not opened the floodgates.
Campaign Activity Stays High, But Fewer Fights & More Settlements

- Number of activism campaigns was flat compared to last proxy season, but 18% fewer campaigns escalated into proxy fights during the 2023 proxy season.
- Campaigns resulted in formal settlement agreement 19% more often.
- Potential drivers of this uptick include:
  - First-year jitters by companies and activists who were uncertain about expected voting dynamics.
  - Companies having heightened focus on vulnerabilities of individual directors.
  - Perception that universal proxy would increase likelihood of an activist winning at least one seat in a proxy fight.
  - Unrelated to universal proxy, the more challenging macroeconomic environment (including fewer and less certain short-term transactional “event” opportunities to push for in a proxy fight).

<table>
<thead>
<tr>
<th>2023 Proxy Season</th>
<th>High Impact Campaigns*</th>
<th>Formally Settled+</th>
<th>Proxy Fights</th>
</tr>
</thead>
<tbody>
<tr>
<td>322</td>
<td>43</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>∆ vs. 2022</td>
<td>↑ 1%</td>
<td>↑ 19%</td>
<td>↓ -18%</td>
</tr>
</tbody>
</table>

* All data is for proxy fights during the 2023 proxy season (Sept. 1, 2022 – June 16, 2023) with comparison to the corresponding period for the 2022 proxy season.

"Proxy fight" means a dissident stockholder filed a contested proxy statement seeking board seats at a U.S.-listed company’s annual meeting and the universal proxy rules applied.

* As classified by FactSet
+ According to 13D Monitor’s database
Much Easier to Target Particular Company Directors Using Universal Proxy

Company Proxy Card:

Activist Proxy Card:
Universal Proxy Doesn’t Meaningfully Change Framework for Activism Risk

- Trading value relative to intrinsic value / SOTP
- Potential transactional alternatives (e.g. divestiture opportunities, sale of company, business development / M&A) and impact of financing markets
- Capital allocation / return opportunities
- Impact of current macro factors on any financial or operational thesis

- Performance relative to peers (e.g., TSR, margins, multiples, company/industry-specific operational metrics)
- Perception of management by investors
- Governance concerns (e.g., takeover defenses, board leadership structure, board tenure, board diversity, board skillsets, individual director vulnerabilities, executive compensation)
- Environmental or social issues

New Universal proxy rules increase odds of at least some activist success

- Focus on individual directors has intensified, including tenure and track record of value creation
- Are significant shareholders (esp. active managers and hedge funds) underwater?
- Recent history of support from shareholders
- Concentration of top shareholders / relative ownership of index funds vs. active managers / hedge funds

Can Activist Make Money?

Can Activist Win Board Seats?

Vulnerabilities for Activist to Exploit?

Highest Risk
Activism is Equal Opportunity, But Most Fights at Smaller Companies

The prevalence of “high impact” activist campaigns has been fairly evenly distributed across the market cap spectrum over the last three proxy seasons, but nearly 80% of U.S. proxy fights during the period occurred at sub-$2B market cap companies (including 84% during the 2023 proxy season).

Source: FactSet, as of June 16, 2023. Micro cap = less than $250mm, Small Cap = between $250mm and $2B, Mid Cap = $2B—$10B, and Large Cap = over $10B

Campaigns and Proxy Fights are both as classified by FactSet.
Activists Have Not Been Nominating More Candidates

Despite speculation that activists would nominate larger slates under universal proxy, the average number of activist nominees on proxy contest slates is flat.

Potential reasons include:
- Activists refrain from over-nominating to avoid losing credibility with institutional investors and proxy advisors (who are focused on appropriate degree of board change that is warranted).
- An appropriately-sized slate allows activists to better target a company’s most vulnerable directors.

Some activists still may initially nominate more director candidates than they would expect to elect in a proxy fight to bolster negotiating leverage:
- Activist would generally submit initial larger slate to company on private basis (only an option if not a 13D filer), with plan to right-size slate if proxy fight ensues.
- However, activists who privately over-nominate risk a backlash from target board, which may reduce odds of swift negotiated resolution.

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“Proxy fight” means a dissident stockholder filed a contested proxy statement seeking board seats at a U.S.-listed company’s annual meeting and the universal proxy rules applied.
Proxy Fight Costs Have Not Come Down for Activists

In the SEC’s adopting release for universal proxy, it calculated activists could run bare-bones proxy fights for under $10,000 using internet delivery of proxy materials to satisfy the 67% solicitation requirement.

Activists can now free-ride off the company’s broad (and expensive) solicitation efforts that include sending physical universal proxy cards to shareholders (which must list the activist’s nominees).

However, there were very few examples of activists attempting to take a bare-bones approach (and seemingly only one situation where an activist taking this approach prevailed).

<table>
<thead>
<tr>
<th>Estimated Costs of Proxy Fight</th>
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<tr>
<td>Activist</td>
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<tr>
<td>2023</td>
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<tr>
<td>Average</td>
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<td>Median</td>
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“Proxy fight” means a dissident stockholder filed a contested proxy statement seeking board seats at a U.S.-listed company’s annual meeting and the universal proxy rules applied.
ISS and Glass Lewis Support for Activists Was Mixed

While ISS and Glass Lewis both continue to require that activists make a case for change, they are placing greater emphasis on each individual director’s qualifications

- Prior to universal proxy, ISS and Glass Lewis each evaluated proxy contests under a two-step analytical framework
  - Activist must demonstrate a compelling case for change at the company
  - If there is a case for change, consider whether to support any activist candidates

- While ISS and Glass Lewis asserted their frameworks would not change under universal proxy, many speculated the ability to mix and match would give them an excuse to drop the first prong and turn to comparing parties’ nominees head-to-head
  - This has generally not transpired in their reports
  - They also continue to impose a higher standard on activists seeking to replace CEOs or a majority of the board
  - However, they have been commenting on individual director vulnerability more than before

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<tr>
<th>Partial Support for Activist’s Nominees</th>
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<tr>
<td>2023</td>
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<td>2022</td>
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* Partial Support for Activist’s Nominees means the proxy advisor recommended shareholders vote for at least one activist nominee.

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*Proxy fight* means a dissident stockholder filed a contested proxy statement seeking board seats at a U.S.-listed company’s annual meeting and the universal proxy rules applied.
Activist Nominations More Frequently Being Challenged

In a highly litigious proxy season, companies challenged the validity of activist's nominations far more often than ever before

► During the 2022 proxy season, three companies declared an activist’s nomination notice defective – all three notices were eventually disqualified

► This season, there have been 13 such challenges
  – Four challenges resulted in disqualification (including in the first attempted proxy fight conducted under the universal proxy rules at AIM ImmunoTech)
  – But several challenges were settled with the company letting the activist’s nominees stand for election

► Factors driving this increase in challenges include:
  – More widespread adoption of modernized advance notice bylaws
  – Boards more carefully enforcing compliance with advance notice bylaws
  – Less experienced activists submitting nomination notices with material omissions or misrepresentations

► Activists also initiated several lawsuits challenging board actions taken during a proxy fight that the activists perceived to be unusually aggressive
  – Many such lawsuits were dropped when the company in question reversed course on the action

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“Proxy fight” means a dissident stockholder filed a contested proxy statement seeking board seats at a U.S.-listed company’s annual meeting and the universal proxy rules applied.
Successful Hostile Defense Emphasizes Importance of Robust Advance Notice Bylaws

Hostile bid and proxy contest: In November 2021, activist hedge fund Alden Global Capital launched hostile bid to acquire Lee Enterprises and an associated proxy contest seeking to replace Lee directors.

Robust advance notice bylaws adopted on a clear day: Lee’s bylaws had been amended over two years before the hostile bid on a clear day to enhance clarity, timing, procedures and required disclosures.

Hostile bidder failed to comply with advance notice bylaws when attempting to nominate directors.

Board rejected nominations and court upheld board’s decision:
- Alden sued in Delaware, seeking to have its nominations recognized.
- Court denied Alden’s request, endorsing Lee board’s strict application of its bylaws.

RESULT: Hostile bidder was not permitted to nominate directors and could not use proxy contest to pressure the company into accepting its hostile bid.
Proxy Fights – Less “All or Nothing” When They Go to a Vote

- Shareholders have elected at least one activist nominee in 67% of proxy fights that went to a vote since universal proxy was adopted, up from 40% last season.

- The frequency of “clean sweeps” by either the company or activist dropped substantially relative to last season (87% in 2022 vs. 67% in 2023).

- More cases of activist winning exactly one seat in a vote (three in 2023 vs. one in 2022) despite fewer votes.

- While sample size is small, these trends suggest that universal proxy:
  - May be making it easier for activists to win at least one board seat (i.e., prior regime was more “all or nothing”)
  - May have made it harder for activists to win board control or elect all nominees on a large slate.

<table>
<thead>
<tr>
<th></th>
<th>Splits*</th>
<th>Clean Sweeps+</th>
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<tbody>
<tr>
<td><strong>2023 Proxy Season</strong></td>
<td>3</td>
<td>6</td>
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<tr>
<td><strong>2022 Proxy Season</strong></td>
<td>2</td>
<td>13</td>
</tr>
</tbody>
</table>

* Split = both Company and Activist win at least one seat

† Clean Sweep = either all Company nominees or all Activist nominees elected

* All data is for proxy fights during the 2023 proxy season (Sept. 1, 2022 – June 16, 2023) with comparison to the corresponding period for the 2022 proxy season.

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How Companies Can Prepare for Activism and Other Board Crisis Situations

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Ten Questions to Prepare for Activism, Hostile M&A, Short Attacks, (anti-)ESG Pressure and Other Threats

Public companies are (rightly) focused on preparing for shareholder activism, but activism is just one of many emergent forms of corporate crisis:

► More unsolicited / hostile M&A approaches given macroeconomic environment and depressed valuations

► Hedge funds specializing in short attacks expanding targets to more mature, global companies
  – Campaigns can lead to significant stock price reactions, governmental investigations, or executive departures

► Tensions between pro- and anti-ESG groups intensify
  – Areas of vulnerability expanding beyond shareholder proposals to litigation, state legislation, and possible state AG investigations or federal Congressional investigations
  – Business, reputational, and financial risks loom (e.g., boycotts or aggressive social media campaigns)

► Landscape for director (and officer) liability for Caremark (oversight) claims continues to evolve

► Boards operating in era of rapid-fire and unprecedented regulatory change in critical areas (e.g., antitrust and environmental policy) and accelerating business and industrial change via technological disruption (including GenAI) that continues to upend and threaten business models

Boards that respond most effectively to major corporate crises are those that approach crisis preparedness holistically and proactively

► While there is no one-size-fits-all approach and each company (and each board) is different, the following questions may be helpful for board chairs to ask to make sure the board is prepared
Crisis Preparedness – Ten Questions for Boards (1/4)

1. Does the board know what may be coming?
   - **Briefings Regarding Vulnerabilities.** Is the board receiving periodic briefings on the company’s most likely vulnerabilities (e.g., compliance, legal, cyber, government relations)?
   - **Advisor Input on Current Issues.** Are outside advisors providing input on industry-wide developments, company-specific threats and relevant current issues (e.g., the impact of universal proxy on shareholder activism and the potential impact of relevant DOJ corporate enforcement priorities)?
   - **Shareholder Base Monitoring.** Is the company monitoring the shareholder base (including its list of registered holders) for suspicious activity and informing the board of critical investor feedback?
   - **Corporate Website Monitoring.** Is it monitoring the corporate website to detect visits by activists, potential bidders and their respective advisors, as well as from government agencies and regulators?

2. Are there policies designed to protect directors (and officers) from potential Caremark claims?
   - **Enterprise Risk.** Is the board regularly briefed on enterprise risks and is there a process for internal and external yellow and red flags (including from whistleblowers) to be elevated to senior management and ultimately the board?
   - **Policies and Procedures.** Have policies and procedures been implemented to develop a record of the board’s good faith efforts to implement and monitor oversight systems and develop policies to escalate risks that are mission critical to the company?
Spotlight: Monitoring the Registered Holder List

Companies should regularly monitor their registered shareholder list as a means for early detection of an impending activist nomination -- such moves are sometimes made on a "clear day" when companies are otherwise not on high alert

- Nearly all shares of public companies are held beneficially through intermediaries, including banks and brokerage firms
  - Shares held directly are registered in the shareholder’s name on the company’s registered shareholder list, which is maintained by the company’s transfer agent (e.g., Computershare, AST, Equiniti)
  - Shares held by beneficial owners generally appear on the registered list as being held by Cede & Co. (as nominee for DTC)
- However, when an activist investor seeks to nominate directors under a company’s advance notice bylaws (as a prelude to a potential proxy fight), they move a nominal number of shares into registered ownership before submitting a nomination notice
  - This is required to prove their ownership and often to comply with the requirements of the company’s advance notice bylaws
- Regularly reviewing the registered list could provide a company with valuable advance notice of potential activism
  - Evidence that an activist moved shares into registered name signals that the activist is making or at least contemplating a nomination
  - While activists frequently engage with companies well in advance of submitting a nomination, we have recently observed a number of activists (including high profile names) making nominations just ahead of the nomination deadline and with little or no prior engagement
  - Early warning of an impending nomination affords the company at least some time to prepare its legal, communications and investor relations responses to a potential public or private approach from an activist
- Transfer agents can provide companies with a regularly updated list of registered holders and transfer sheets, which should be reviewed for any new entrants

<table>
<thead>
<tr>
<th>Account Number</th>
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<th>N.A.I.</th>
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WHAT DOES A REGISTERED HOLDER LIST LOOK LIKE?
Spotlight: Website Monitoring as an Early-Warning Tool

Companies should consider whether to engage website monitoring services as an early-warning tool regarding potential third party shareholder activism, M&A or other corporate transactions.

- Services are able to identify all visitors to the website, often including the name of the visitor, what pages were viewed and for how long. These services utilize significant databases that allow them to link web fingerprints to specific firms.
- For example, can be used to identify activists and private equity firms (and investment banks and other advisors) in advance of any initial inbound on an engagement.

**ILLUSTRATIVE SAMPLE REPORT**

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Page Visits</th>
<th>Duration</th>
<th>Visit(s)</th>
<th>Landing Page</th>
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<td>2 min 11 sec</td>
<td>MultiVisit</td>
<td>Home page</td>
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<tr>
<td>Activist 2</td>
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<td>Press releases</td>
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<td>Corporate 1</td>
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<td>Financial Advisor</td>
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<td>MultiVisit</td>
<td>Financial information / annual reports</td>
</tr>
</tbody>
</table>
3. Does the company have processes in place to identify and address reputational risks associated with an increasingly polarized political and cultural climate?

- **Identification of Reputational Risks.** Does the company have workable processes for surfacing reputational risks that could be associated with public-facing communications or marketing activities?

- **Plans for Political / Social Controversies.** Has management reviewed with the board the company’s plans for addressing external political or social developments for which there may be pressure from employees, customers or the general public for the company to take a stand?

4. Is the long-range plan updated and sensitized to the new economic landscape?

- **Long-Range Plan Updated.** Has management updated the company’s long-range plan and key assumptions for the current macroeconomic environment?

- **Understanding of Assumptions / Sensitivities.** Are assumptions and sensitivities discussed with management and clearly understood so as to maintain appropriate flexibility for the board in the event an unsolicited bidder or activist approaches?

5. Is the company communicating its strategy and the board’s expertise appropriately?

- **Strategy Communications.** Does the company have a plan to present the company’s long-term strategy to large shareholders and other key stakeholders?

- **Tailored Director Bios.** Are director bios in the company’s proxy statement and investor website drafted to communicate why and how each director’s background, skillsets and experience add unique value to the board, as opposed to being limited to recitations of employment history and more general rationale?

- **Board Candidates.** Does the board have an informed list of potential board candidates in case needed?
6. Has ESG disclosure been vetted?

   ESG Disclosure – Compliance Vetting. Has the company’s ESG (including DEI and sustainability) disclosure been vetted for compliance with evolving regulations, as well as investor, proxy advisor and other stakeholder expectations and from a litigation risk perspective?

   ESG Disclosure – Stakeholder Reactions. Has such disclosure been reviewed for potential backlash from ESG and anti-ESG perspectives?

7. Does the board periodically evaluate its structural defenses to activism and takeovers?

   Charter / Bylaws Review. Have management and advisors reviewed with the board potential updates to its charter and bylaws to address the new universal proxy rules and, where applicable, state law (e.g., officer exculpation for Delaware companies)?

8. Is there a protocol for directors and senior executives to follow if they receive inbounds from an activist, unsolicited bidder or other third party?

   Processes and Best Practices. Does the board receive periodic reminders of best practices for notetaking, emails, texts and other communications with a view toward protecting attorney-client privilege and preparing for potential litigation and proxy fight? And do these take into account key recent cases and enforcement actions where emails and texts were the primary source of evidence for civil plaintiffs and/or regulators?
Spotlight: Overview of Potential Bylaw Amendments*

**Advance Notice Bylaws / Universal Proxy**
- Require nominating shareholder to certify compliance with new SEC universal proxy rules shortly before meeting date
- Clarify that a nominating shareholder must be a holder of record (not simply a beneficial holder) and that notice must be delivered by record holder
- Establish clear eligibility requirements for requesting D&O questionnaire and other nomination materials (i.e., must be a stockholder of record to request)
- Enhance disclosure requirements with respect to nominating shareholder (e.g., disclosure of any known supporters of shareholder’s efforts, short positions, and economic interests in related matters or competitors)
- Allow company to request supplemental information from the activist and its nominees after the nomination deadline, and require response to such requests within 5 business days
- Clarify timing, logistics and manner of delivery for nomination notice

**Enhancements to D&O Questionnaire**
*(No Bylaw amendment required)*
- Expand disclosures from nominees relating to their relationship with the activist nominating them, including with respect to financial interests in activist’s funds, prior nominations by the same activist and timing of activist’s outreach to the nominee
- Require disclosure of whether nominees have notified and received consent from their other boards to serve on the company’s board

**Miscellaneous**
- **Majority Voting:** Where company has majority voting for uncontested director elections, clarify that an election is “contested” (and plurality voting applies) if company has received competing nominations that haven’t been withdrawn as of a point in time before company mails its proxy, even if the board determines the activist’s nomination notice does not comply with the advance notice bylaws
- **Gender Neutral:** Eliminate gender-specific references throughout bylaws
- **DGCL Amendments:** For Delaware companies, make changes to bylaws to account for August 2022 amendments to Delaware corporate law

* These amendments are illustrative. Kirkland is prepared to suggest tailored recommendations based on an individual company’s relevant considerations.
Crisis Preparedness – Ten Questions for Boards (4/4)

9. How will the board make decisions in a live-fire crisis?
   - **Scenario Planning.** Have management and the relevant advisors developed and taken the board through action plans to familiarize directors with the cadence, tactics and timelines of potential crisis scenarios and sensitize directors at a high level to the merits and pitfalls of a range of possible response options when the company is attacked?

10. Does the company have a knowledgeable and integrated crisis response team?
    - **Playbook.** Does the company have a playbook with identified internal leaders who will be the decisionmakers for various types of crises?
    - **Identified Advisors.** Does the company have outside counsel, a financial advisor, a crisis PR firm and other relevant specialists engaged or on standby for potential crisis scenarios? Is the internal and external response team sensitized to the company’s culture, priorities and vulnerabilities?
    - **Counsel with Relevant Expertise Across Potential Vulnerabilities.** Does outside counsel have the breadth of expertise to cover the relevant threat landscape (including corporate governance, activism, hostile M&A, bet-the-company litigation, white collar (SEC / DOJ), Congressional investigations, ESG, and cyber)?

We encourage board leadership to work with fellow directors, senior management teams (particularly the general counsel) and trusted advisors to consider these questions as part of an effort to develop a crisis response program that is carefully tailored to the company’s specific needs.
Questions?

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