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Shareholder Activism – 2024 Mid-Year Review

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Shareholder activism in the U.S. has maintained the strong momentum it gained during the final few months of 2023, particularly in the micro-cap space. With two weeks still left in June, 446 U.S. companies were subject to activist demands during the first half of 2024, representing an 8% increase in such demands compared to the first half of 2023, according to Diligent Market Intelligence ("Diligent"). Europe, on the other hand, saw a significant slowdown in shareholder activism during the same timeframe, with 48 companies subject to activist demands in the first half of 2024, representing almost a 50% decrease compared to the first half of 2023, according to Diligent. The APAC countries experienced modestly depressed levels of activism relative to the comparable period in 2023, according to Diligent. Notably, after an explosion of shareholder activism in Korea in 2023, the number of companies subject to activist demands in the first half of 2024 plummeted by over 40% relative to the first half of 2023.

Shareholder activists and companies alike entered the 2024 proxy season with a greater familiarity with the universal proxy card ("UPC") rules, which have had a unique impact on their respective approaches to proxy contests. Requiring both companies and dissident shareholders to use a UPC that lists all candidates nominated for election and clearly distinguishes between the company's nominees and dissident's nominees has given activists the ability to craft their campaigns to surgically target directors they view as most vulnerable. With this strategy unlocked, we've observed activists running smaller slates while achieving impressive success rates, winning nearly 80% of the seats targeted at the largest companies during Q1 2024, according to Barclays.

As the impacts of the UPC requirements come further into focus, two major trends continue to be apparent: First, settlement agreements between activists and companies are being reached faster and more often. So far in 2024, a total of 22 U.S. proxy fights have ended in settlement agreements, compared to the 26 proxy fight settlements that occurred in all of 2023, according to FactSet. Additionally, the average time-to-settlement in this year's public campaigns has been approximately 110 days, representing a 25% compression of the settlement timetable compared to the 147-day average in the first half of 2022 (pre-UPC), according to FactSet. Nevertheless, activists secured 53 board seats through settlement negotiations in 2024, accounting for nearly 70% of the 76 seats obtained in total this year, according to FactSet.

Additionally, as we predicted, first-time activists have not flooded the playing field in overwhelming droves under the new UPC paradigm. First-time activists have launched approximately 18% of the campaigns so far in 2024, a marginal decrease from the 22% mark set in the first half of 2022 (pre-UPC), according to FactSet. Nonetheless, the top-10 activists, including the likes of Elliott Management, Land and Buildings and Starboard Value, remain the leaders in institutional shareholder activism in terms of number of campaigns launched and running campaigns at the large-cap U.S. companies.

Three High-Profile Campaigns

The first-half highlights of 2024 also feature the conclusions of three landmark activist campaigns, including the most expensive proxy fights in U.S. and Canadian history.

Trian Fund Management at The Walt Disney Company

Trian Fund Management launched a second campaign at The Walt Disney Company, in what became the most expensive proxy contest in U.S. history. Amidst concerns that Disney failed to adapt to industry disruptions, endured chronic management succession failures and underperformed its peers, Trian ran a slate of two director nominees, including Nelson Peltz and former Disney CFO Jay Rasulo, seeking to “Restore the Magic” at the company.

Despite shareholders ultimately voting to re-elect Disney’s full board at the annual meeting in April, Trian’s campaign can still be viewed as a success. Victory in a proxy contest extends beyond the number of seats won; it encompasses whether the activist’s pressure results in meaningful change that a board would not have otherwise implemented. While highlighting Disney’s operational and strategic shortcomings, Trian proposed several business initiatives with a goal of improving the company’s performance and enhancing shareholder value.

As a result, Disney’s stock price increased by roughly 50% as of the date of the annual meeting from its 2023 low and was the best performer in the Dow Jones for the year through the meeting date. Moreover, several of Trian’s suggestions were ultimately adopted by Disney, including establishing financial targets to improve its streaming services, streamlining content under production, introducing ESPN-related initiatives, and committing to new investments and capital projects.

Browning West at Gildan Activewear

Not long after the conclusion of Trian’s record-breaking campaign at Disney, the most expensive and most successful proxy contest in Canadian history came to a dramatic end in May. Olshan client Browning West spearheaded a historic campaign at the Montreal-based apparel company, Gildan Activewear, in response to the company’s unexpected decision to abruptly terminate co-founder and CEO Glenn Chamandy.

Browning West's campaign to replace the entire Gildan board featured the rare unanimous recommendation of all three leading proxy advisory firms – ISS, Glass Lewis and Egan Jones – for shareholders to vote for the election of the activist's full slate. The nearly six-month battle concluded when, just days before the annual meeting, Gildan's entire board resigned en masse, accompanied by the resignation of the CEO. This paved the way for shareholders to elect Browning West's full eight-member slate at the meeting and the restoration of Chamandy as CEO and President. The success of this landmark campaign across the border evoked comparisons in the media to Starboard's storied full-board takeover of Darden Restaurants back in 2014.

Strategic Organizing Center at Starbucks

The Strategic Organizing Center ("SOC"), a coalition of labor unions in North America, launched an equally historic campaign at Starbucks in November 2023 to challenge the coffee company's long-time resistance to employees' attempts to unionize. The SOC believed Starbucks' history of silencing the voice of employees "resulted in arguably one of the most glaring and destructive examples of human capital mismanagement corporate America has seen."

This campaign marked the first time a labor union deployed the activist investor playbook to pressure a company to address its human capital issues and the resulting threat to shareholder value. SOC nominated three highly-qualified candidates to the board and hired the suite of legal and communications advisors typically sought by activist investors to assist with their campaigns. During the course of the campaign, SOC tied general labor issues to fundamental shareholder value themes to drive support for its candidates, highlighting that since 2021, Starbucks has reportedly spent approximately $250 million on its union resisting efforts and currently faces numerous unfair labor practice complaints and related injunctions sought by the National Labor Relations Board in federal court.

Ultimately, SOC withdrew its three-member slate one week before the annual meeting after Starbucks agreed to commence negotiations with Workers United (the union representing Starbucks employees) on a framework to reach collective bargaining agreements for represented stores and a "fair process" for employees to organize. While SOC did not receive any direct concessions from Starbucks in exchange for withdrawing, many still view the campaign as a resounding success. SOC's efforts to hold Starbucks accountable for its labor relations policies helped bring it to the negotiating table with Workers United and will likely serve as an inspiration for other advocacy groups to run similar campaigns.

Moelis **Decision's Impact on Settlement Process**

The Delaware Chancery Court's recent decisions regarding the validity of certain provisions of shareholder agreements under Delaware law, most notably in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, have unsettled the process for investors to reach agreements with companies to improve their boards and overall corporate governance. Although typical activist cooperation agreements providing for the appointment of new independent directors are worlds apart from the sort of shareholder agreement giving one investor corporate control that concerned the court in *Moelis*, over the past few months we have seen opportunistic plaintiff firms sue to challenge agreements between companies and minority investors that installed new and highly qualified independent directors unaffiliated with the investors.

While we believe there are clear ways to address the legal issues presented by the court's decision and keep key cooperation agreement provisions intact, we are hopeful that Delaware will adopt proposed legislation that would have the effect of returning Delaware law to the pre-*Moelis* status quo.

SEC Filing Reminders and Housekeeping

The SEC's amendments to the rules governing beneficial ownership reporting on Schedules 13D and 13G took effect on February 5, 2024. As a reminder, the deadline for filing an initial Schedule 13D is now five business days (shortened from the legacy 10 calendar days), and amendments must be filed within two business days after a material change occurs. The filing cut-off time for Schedules 13D is now 10:00 p.m. Eastern Time on any given business day (extended from the legacy 5:30 p.m.), so we are beginning to see more Schedules 13D being filed in the late evening.

Beginning on December 18, 2024, all Schedules 13D will need to be filed using a structured, machine-readable XML-based language in order to make it easier for market participants to compile and analyze the disclosed information. We anticipate Edgarization of the Schedules 13D in XML may require more lead time for those accustomed to filing right before the deadline and it may take some time to get used to the new look of these filings on the SEC's website.

Finally, many shareholder activists are now subject to the newly amended Form N-PX filing requirements applicable to Form 13F filers. Under the amended rules, Form 13F filers will be required to file their initial Forms N-PX by August 31, 2024 to report their voting records on "say-on-pay" proposals during the annual period from July 1, 2023 to June 30, 2024. We have advised all our activist clients not to wait to track the number of shares voted or that could have been voted, including shares loaned out but not recalled for the vote, at shareholders meetings of their portfolio companies in order to be in a position to timely file rather than scrambling at the eleventh hour to reconstruct their voting records.