

## **(More) Observations on the Universal Proxy Card**

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In our previous article, [\*\(Much Too Early\) Observations on the Universal Proxy Card\*](#), we reviewed what had occurred in the months immediately following the efficacy of the universal proxy rules, including by providing select observations regarding the first three contests in the universal proxy era. As our concluding observation, we noted that the more things changed, the more they stayed the same. That is, despite the universal proxy rules' refinement of the mechanics by which directors are elected, the purposes and objectives of proxy contests involving board representation had not yet evolved. That can no longer be said, in light of the 2024 proxy season.

The universal proxy era has, in recent months, welcomed numerous firsts, including, among others, the first (i) proxy fight constructed with an E&S focus (the Strategic Organizing Center's campaign at Starbucks), (ii) multiparty proxy fight (the concurrent campaigns run by Trian and Blackwells at Disney, which were accompanied by ValueAct's solicitation in support of the company), and (iii) control contest to go to a vote at a U.S.-based company subject to the universal proxy rules (Ancora's campaign at Norfolk Southern). In each instance, the activist fell short of its board-related objectives but nonetheless walked away with significant ancillary successes.

When the universal proxy rules were introduced, several commentators had predicted—or feared—a deluge of “single-issue campaigns.” The 2023 proxy season did not bare that prediction out. Nor has the 2024 proxy season. But, the Strategic Organizing Center's efforts (which were generally unmotivated by the use of a universal proxy card) to highlight what it believed to be Starbucks's problematic approach to human capital management reinforced the viability of proxy contests with an E&S core. At the same time, many of the perceived challenges associated with running an E&S-focused campaign surfaced during the coalition of labor unions' contest at the world's best-known coffee company. For example, true to the August 23, 2022 “Research Note” issued by the Special Situations Research team at Institutional Shareholder Services (“ISS”) regarding the relationship between the commencement of the universal proxy era and ESG-centered contests, ISS, when recommending that shareholders vote for the company's nominees, concluded that there was no apparent “link” between the underlying unionization matters and Starbucks's underperformance. Nonetheless, the effectiveness of the Strategic Organizing Center's campaign for change relative to the company's labor relations strategy has laid the foundation for similar undertakings at other issuers.

In the Securities and Exchange Commission's adopting release in respect of the universal proxy rules, it recognized both the possibility for, and infrequency of, election contests involving more than one soliciting shareholder. Like “single-issue campaigns,” however, multiparty solicitations have already materialized—but not in the way that the governance community expected. At Disney, Blackwells launched an unusual (and “inconsistent,” according to ISS) parallel campaign to elect three board nominees that was predominantly cast as supportive of incumbent leadership and critical of the other soliciting shareholders, including ValueAct, which had similarly taken up arms in defense of the company's nominees. Blackwells also attempted to obtain support for a shareholder proposal to override the results of the election of directors in the event that any incumbent director was not elected at the annual meeting. So, while one activist

sought board change, operational improvements, and other governance enhancements, another sought to back each existing director, elect new directors, and attack a fellow shareholder. In other words, the first multiparty contest took a rare shape and underscored the dynamism attending the universal proxy card, including by shedding additional light on the importance of clearly formulated proxy cards and shareholder voting instructions.

Further, in anticipation of the implementation of the universal proxy rules, commentators espoused the belief that campaigns seeking a change in board control would be more difficult under the universal proxy rules—a view largely shared by activist and corporate advisors—given that the universal proxy card introduced a voting mechanism by which shareholders could more precisely tailor board composition and obviated the “this-or-that” effect inherent in the old two-card system (*i.e.*, shareholders voting on a control contest no longer have to select the issuer’s slate or the shareholder’s slate, but can instead “pick and choose” their preferred nominees). At Norfolk Southern, we saw shareholder democracy in action: While ISS recommended that shareholders support five of Ancora’s seven nominees (Glass Lewis recommended that shareholders support six such nominees and Egan-Jones supported all seven Ancora candidates), shareholders ultimately voted for more moderate reform, electing three nominees and blocking Ancora’s efforts to replace the company’s CEO—a result which perhaps might have been different under the previous “one-or-the-other” system, given the advisory services’ sweeping support for Ancora’s candidates.

The activism landscape has not only changed by virtue of the universal proxy rules and their newfound applications. Delaware has done its part to both clear up and muddy the ground on which companies and shareholders engage with one another.

In [\*\(Much Too Early\) Observations on the Universal Proxy Card\*](#), we raised concerns regarding the pervasive implementation and utilization of unduly restrictive advance notice bylaws principally designed to thwart alternative director nominations and undercut the import of the universal proxy card. By the time the universal proxy rules took effect, it was clear that public companies had concluded that unwieldy and disconnected advance notice bylaws were potentially a potent defense to board-related activism and a solution to the required use of universal proxy cards (*i.e.*, universal proxy cards are of no consequence (and are not used) when a nomination notice is properly declared invalid at the outset and shareholders are denied the opportunity to vote for directors other than those selected by the incumbent board). To illustrate, the number of companies that made changes to advance notice bylaws in 2023, as compared to 2018, increased by over 900%<sup>1</sup>—a fairly astonishing figure driven, in part, by the fact that there was a dearth of Delaware authority covering the application of [“second generation” advance notice bylaws](#) with provisions manufactured to remove the possibility of a contested election and disqualify shareholder nominations.

But, Delaware courts have continued to demonstrate their sophistication by seeing through veiled attempts to use governing instruments to disenfranchise shareholders. Most notably, Politan Capital Management brought suit against Masimo Corporation to challenge its not-so-veiled attempts to entrench incumbents through the use of bylaw provisions that, among other things, sought information concerning nominating shareholders’ passive limited partners and their

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<sup>1</sup> Deal Point Data, *2023: A Record Year for Charter and Bylaw Amendments* (January 11, 2024).

families, highly-sensitive (and sometimes non-public) information regarding engagement at other public companies, and information designed to quell permissible communications among shareholders. As the litigation progressed in the Delaware Court of Chancery, it seemingly became clear to Masimo that its advance notice bylaw—which was widely criticized and previously rejected by sophisticated defense advisors—was draconian, as the company later repealed the challenged provisions to moot the corresponding portions of Politan’s action.

More recently, in *Kellner v. AIM ImmunoTech, Inc.*, the Delaware Court of Chancery found to be facially invalid certain bylaw provisions that “inequitably imperil[ed] the stockholder franchise to no legitimate end.” The Court of Chancery took particular issue with four provisions. First, a provision that created an “ill-defined web of disclosure requirements” with respect to certain agreements, arrangements, and understandings relating to a nomination. Second, a provision that, in addition to suffering from the problematic overbreadth described in the immediately preceding sentence, imposed “ambiguous requirements across a lengthy term” regarding understandings in respect of consulting, investment advice, or a previous nomination at a publicly traded company within the last ten years. Third, an unbounded provision that required disclosure of “all known supporters” of a nomination. Fourth, a securities ownership provision that employed “1,099 words and 13 subparts” and which the Vice Chancellor described as “indecipherable.”

Critically, despite the invalidities in the advance notice bylaw, the *Kellner* Court upheld the company’s rejection of the associated nomination notice. The Court of Chancery’s opinion is another reminder that nominating shareholders, even when faced with problematic advance notice provisions, need to continue to be especially mindful of the accuracy and comprehensiveness of disclosures contained in their nomination notice while simultaneously carefully considering their options with respect to overreaching provisions.

It should be noted that, as of the date of this writing, *Kellner* is under consideration by the Delaware Supreme Court. During oral arguments on appeal, the Justices asked several thoughtful questions concerning the impact of the case on existing bylaws at other companies, what the guardrails are for advance notice bylaw disclosure requirements, particularly in light of the fact that the Delaware General Corporation Law provides scant guidance on the question of nomination procedures, and what the Delaware judiciary should do to “discourage[e]” companies from “adopting impossible bylaws.” A decision from the Supreme Court is expected in the coming days.

Despite the issues presented at Masimo and AIM ImmunoTech, we have seen companies continue to adopt—including on so-called “cloudy days”—overbroad and unworkable advance notice provisions that are, in the *Kellner* Court’s words, “ripe for subjective interpretation” by a board. We have also seen companies continue to rely on “information gathering” (even with respect to information already in a company’s possession) as the pretext for adopting disclosure requirements that serve no election-related purpose other than to operate as tripwires and provide the company with leverage in the context of a contested election, settlement, and/or litigation. In short, Vice Chancellor Will’s hope that the lessons of *Kellner* would be “heeded in matters still to come” seems to have been displaced by a disregard for the well-established principle that boards must make shareholder welfare their sole end.

Delaware's recent impact on the practice of shareholder activism has also reached settlements. The Delaware Court of Chancery, in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, invalidated provisions of a shareholder agreement that required a board to recommend to shareholders that they elect another shareholder's nominees, in addition to provisions providing a shareholder with the right to fix the size of the board, determine the composition of board committees, and fill vacancies on the board—concepts that were historically central to cooperation agreements between companies and their shareholders in the context of resolving potential or actual proxy contests. The end result has been demonstrable uncertainty (including through differing market practices) around the contours of an appropriately balanced settlement between an engaged shareholder and a company, particularly with respect to the utilization of fiduciary outs and the consequences thereof to the company.

The Council of the Corporation Law Section of the Delaware State Bar Association has proposed amendments to the Delaware General Corporation Law that are meant, in part, to reintroduce certainty by addressing the outcome in *Moelis* and explicitly permit companies to, among other things, execute agreements with shareholders whereby the company (i) agrees to restrict or prohibit itself from taking actions specified in the agreement, (ii) requires the approval or consent of one or more persons or bodies before the company may take actions specified in the agreement, and (iii) covenants that the company or one or more persons or bodies will take, or refrain from taking, actions specified in the agreement. If enacted, the amendments are scheduled to become effective on August 1, 2024, but will not affect any action or proceeding completed or pending before such date, meaning that the governance community will have to remain mindful of *Moelis* and its import. Even so, a question remains as to how such amendments (including if they are not further revised) will impact board primacy and function to reshape contracting around governance in Delaware, potentially introducing a new layer of uncertainty that goes beyond the issues addressed in *Moelis*.

To conclude, the early stages of the 2024 proxy season have been marked by outright company successes at the ballot box—results which run contrary to the tidal wave of predictions concerning the ease with which shareholders would obtain at least partial victories through the use of universal proxy cards—and measured victories in the courtroom. Shareholders are finding new, creative ways to realize their objectives, both investment and otherwise, through engagement, setting the stage for the further evolution of public and private campaign strategies. Moreover, attention to detail and experience have seemingly never mattered more, as every phase of an engagement is increasingly susceptible to being placed under the respective microscopes of companies, shareholders, courts, regulators, and proxy advisors, with missteps being strategic distractions, expensive, and dilutive to messaging, if not outcome determinative.

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