

A Review of Proxy Fight Outcomes Under the Universal Proxy Rules

December 15, 2023

With the outcome determined for all but one annual meeting proxy fight for companies subject to the universal proxy card (UPC) rules, we take the opportunity to examine the full-year results of 2023 proxy fights – the first full year under which the UPC rules were in effect.

The proxy fight at AIM ImmunoTech Inc. (AIM) by a group comprised of Todd Deutsch and Ted Kellner remains the only open contest for a 2023 annual meeting. AIM rejected the group’s director nominations for failing to comply with its advance notice bylaw, a decision the group has challenged in the Delaware Court of Chancery. The December 1, 2023, annual meeting has been adjourned by the company until December 29, 2023, in order to provide the Court with sufficient time to issue a ruling. Entering the year, speculations and predictions abound on how much the UPC would change the activism landscape. One year does not make a trend, and commentators have noted that it will likely take a few annual meeting cycles for the full effects of the UPC to be realized. Thus far though, many of the predictions (and fears by companies) have yet to materialize. A review of proxy fight results for 2023 shows that the numbers are largely in line with 2022 – the most remarkable thing about the data is how unremarkable it has been. We review some of the predictions versus the reality.

What is Universal Proxy?

As a reminder, under new SEC Rule 14a-19 a universal proxy card must include the names of all director nominees presented by management and dissident shareholders for election at an upcoming shareholder meeting. The universal proxy will allow shareholders not attending an annual meeting in person to choose between company and dissident director nominees on a single proxy card in director election contests. Previously, the shareholder would have to choose between voting on either the company proxy card or the dissident proxy card, preventing shareholders from selecting a combination of candidates from each slate. The new rules apply to all shareholder meetings involving contested director elections held after August 31, 2022. The UPC rules do not apply to regulated funds (e.g., closed-end funds), business development companies and foreign private issuers (thus these entities have been excluded from our analysis).

UPC Will Result in More Proxy Fights

While many commentators expected a rise in the number of proxy fights in 2023, such an increase never materialized. Based on the annual meeting date, the number of proxy fights in 2022 versus 2023 was nearly identical at 61 and 60, respectively. The number of proxy fights going to a vote also remained unchanged at 14.

More Activist Success in Votes

Adding the ability for a shareholder to “mix and match” the nominees it wants to support instead of forcing a binary choice between the company’s slate and dissident’s slate was expected to result in more activist success at the ballot box. Based on the relatively small sample size of proxy fights going all the way to a vote, any gains were modest at best. The number of proxy fights resulting in the election of at least one dissident nominee increased slightly in 2023 to six proxy fights (14 total nominees elected) from five proxy fights (total of 15 nominees) in 2022. The number of proxy fights we categorized as an “Dissident Win” (i.e., resulted in the election of a majority of the seats sought by the dissident) remained unchanged at four.

Proxy Fight Outcome	2022		2023	
	# Campaigns	% Total	# Campaigns	% Total
Formal Settlement (Non-Seats)	3	4.9%	4	6.7%
Formal Settlement (Seats)	18	29.5%	21	35.0%
Nomination Rejected (Ended)	1	1.6%	6	10.0%
Pending	0	0.0%	1	1.7%
Went to a Vote (Company Win)	9	14.8%	8	13.3%
Went to a Vote (Dissident Partial Win)	1	1.6%	2	3.3%
Went to a Vote (Dissident Win)	4	6.6%	4	6.7%
Withdrawn - Disclosed	24	39.3%	10	16.7%
Abandoned without Announcement	1	1.6%	4	6.7%
Total Campaigns	61	100.0%	60	100.0%

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Source: Deal Point Data Activism

More and Quicker Settlements

It was expected that the UPC rule would increase the leverage activists have over companies and would result in companies being more willing and eager to reach an agreement to resolve the contest. The data bear out this prediction. The number of proxy fights that resulted in a formal settlement increased from 34% in 2022 to almost 42% in 2023. Proxy fights were also settled earlier in 2023. Fifty-seven percent of the proxy fights settled in 2022 were done so before progressing as far as the activist distributing preliminary proxy materials. In 2023, 68% of proxy fights were settled before reaching this stage.

Proxy Fight Furthest Stage	2022		2023	
	# Campaigns	% Total	# Campaigns	% Total
Announced	15	24.6%	20	33.3%
DFAN Filing	10	16.4%	10	16.7%
Dissident PREC	13	21.3%	6	10.0%
Dissident DEFC	9	14.8%	10	16.7%
Vote	14	23.0%	14	23.3%

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Source: Deal Point Data Activism

Proxy Fight Furthest Stage – Settled Fights Only	2022		2023	
	# Campaigns	% Total	# Campaigns	% Total
Announced	7	33.3%	9	36.0%
DFAN Filing	5	23.8%	8	32.0%
Dissident PREC	6	28.6%	4	16.0%
Dissident DEFC	3	14.3%	4	16.0%

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Source: Deal Point Data Activism

Control Contests vs. Minority Representation

Some had speculated that the UPC rules could change the strategic rationale for running a control slate versus seeking only minority representation. Thus far, there has been no change in terms of board control sought. The proportion of proxy fights seeking minority representation (including single-seat fights) remained unchanged at 80% in 2022 and 2023.

Board Control Sought	2022		2023	
	# Campaigns	% Total	# Campaigns	% Total
Full	6	9.8%	3	5.0%
Control	6	9.8%	9	15.0%
Minority	37	60.7%	37	61.7%
Single Seat	12	19.7%	11	18.3%

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Source: Deal Point Data Activism

UPC Has the Potential to Reduce Proxy Fight Costs

There was speculation, including the SEC’s own analysis in adopting the rule, that the UPC had the potential to reduce proxy fight costs. For example, with activist nominees appearing in company proxy materials which will be sent to all shareholders, an activist could theoretically reduce fight costs by sending only a one-page notice informing shareholders of the online availability of proxy materials (“notice and access”) to the required 67% of the voting power. However, thus far the data does not show any reduction in costs for activists. Based on the estimated costs associated with the proxy fight disclosed in dissident proxy statements, average costs actually increased in 2023 when comparing to proxy fights in 2022. The median activist costs remained unchanged at \$1 million in both 2022 and 2023. Estimated costs are only disclosed for proxy fights that progress to at least a PREC14A filing.

Activist Estimated Proxy Fight Costs (\$mil)	2022	2023
No. of Proxy Fights Where Costs Disclosed	24	26
Average	\$1.16	\$2.50
Median	\$1.0	\$1.0

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Estimated total activist costs associated with the proxy fight as disclosed in the dissident proxy statement. Source: Deal Point Data Activism

ESG Activist Fights

One of the most anticipated questions entering the 2023 proxy season was whether ESG focused activists, who primarily use the 14a-8 shareholder proposal process to further their goals, would take advantage of the UPC rule and nominate their own director candidates. In 2023 the answer was no – proxy fights focused on economic issues and the types of shareholders nominating competing director nominees resemble those in prior years (i.e., hedge funds, current and former directors, and founders). However, this will change in 2024. The Strategic Organizing Center recently announced it is seeking three of the eight seats up for election at Starbucks Corporation’s annual meeting expected to be held in March 2024. Representing members of the Service Employees International Union, Communications Workers of America and United Farmworkers of America, the coalition issued a press release critical of management’s treatment of its hourly staff and ongoing initiatives to impede and undermine efforts to unionize the enterprise.

Other Noteworthy

More Nomination Rejections

Companies are increasingly scrutinizing nomination notices to ensure that they comply with advance notice bylaws. Based on the date the company announced the rejection, there was a 140% increase in the number of campaigns where the company rejected the nomination notice for various deficiencies in 2023 over 2022 (i.e., from five campaigns in all of 2022 to 12 as of December 13, 2023).

2023 Proxy Fights - Dissident Nominee Outcome	Nominees	% of Nominees
Fight Settled (no seat for this nominee)	50	27.8%
Fight Withdrawn (entire slate)	34	18.9%
Seat Granted via Settlement	27	15.0%
Not Elected	24	13.3%
Elected	14	7.8%
Nomination Rejected	14	7.8%
Removed from Slate	14	7.8%
Pending (AIM ImmunoTech Inc.)	3	1.7%
Total Nominees	180	100.0%

Board seat proxy fights announced at SEC reporting companies based on annual meeting date year. Excludes fights at regulated funds (e.g., closed-end funds), business development companies, and foreign private issuers. Source: Deal Point Data Activism

Fewer Female Nominees

A comparison of the nominees submitted in 2022 versus 2023 shows that activists nominated fewer female candidates this year. The percentage of nominees that are female declined from 27.1% in 2022 to 18.9% in 2023. Interestingly, while female nominees only represented 18.9% of all nominees, they represented 28.6% of dissident nominees elected in proxy fights going to a vote (i.e., four out of 14 elected).

More Founder Proxy Fights

Disgruntled company founders have embraced the UPC. The number of proxy fights by activists that include a company founder nearly doubled from four in 2022 to seven in 2023.

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