

Strategic Investigations Provide an Edge in Proxy Fights

by **Sean Weathersby**

In 2023, we predicted that the adoption of new universal proxy voting cards, mandated by the SEC in 2022, would trigger an uptick in activist campaigns, and since then we have seen early indications that it has. According to Barclays, the post-pandemic period of 2022-2024 was the busiest three-year period for activism on record, with a global average of 243 campaigns per year. We have also seen a record number of CEOs ousted as part of this trend: **27 public companies in the United States saw CEO turnover in 2024**, compared with a four-year annual average of 16¹. Given the ongoing volatility in the global economy, we expect heightened levels of shareholder activism to continue.

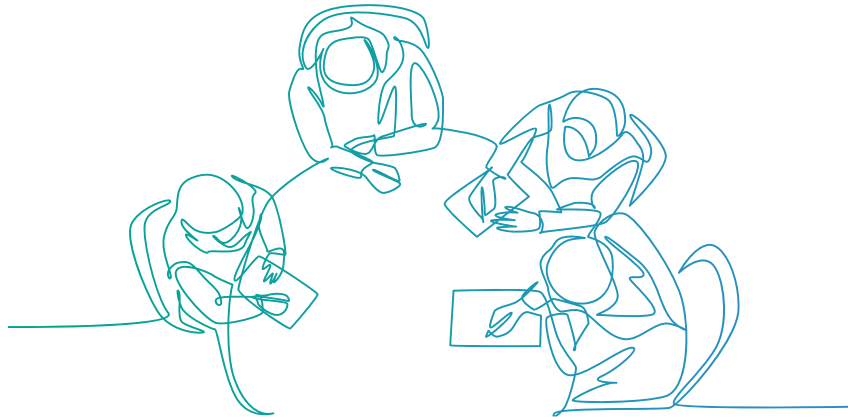
While it is still difficult for activists to secure board seats—only 11 percent of the seats contested in the United States went to activists in 2024—the mounting of dissident slates remains the most frequently used implement in the activist toolbox. When management is confronted with a dissident slate, it is standard practice to conduct due diligence on the activist candidates. However, in the larger context of an activist battle, the standard level of diligence one would do on a routine board director – **looking for traditional red flags like a criminal DUI or hidden gaps in a resume – is not enough**. The goal should be to build a holistic understanding of the nominee that puts management on a stronger tactical and strategic footing, however the confrontation with the activist unfolds.

¹ **“2024 Review of Shareholder Activism,”** Jim Rossman, Quinn Pitcher, and Josh Jacobs, Harvard Law School Forum on Corporate Governance, January 21, 2025.

Looking beneath the surface

At a tactical level, due diligence can expose weaknesses in the dissident nominees' candidacy. For example, activists often argue that their slate would bring a new level of objectivity and independence to the company's board—but does the director nominee have a relationship with the activist or with the other insurgent nominees that would undercut those claims? Recently – by piecing together timelines, corporate histories and relationship networks – we were able to determine that one dissident nominee had worked with the activist for decades and that all the boards on which the nominee had sat encompassed companies in the portfolio of the activist's family office, none of which was immediately apparent from the director's public profile. In another case, we discovered that the dissident slate included nominees who had contributed to the political campaigns of the activist's spouse, attended the same religious institution as the activist and were connected through shared hobbies.

Similarly, it is important to look below the surface of the nominees' track records. If the nominee has served as the director of other company boards, what was the quality of governance during their tenure? We have found nominees who have served on boards where directors were excessively compensated and failed to follow corporate governance best practices. Another nominee was accused of “blatant self-dealing” due to conflicts of interest during the nominee's board tenure in a lawsuit brought by shareholders that was settled out of court. In a third case, we found that one insurgent nominee held directorships at companies that suffered high-profile bankruptcies and litigation.



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A nominee's behavior outside of work can also be revealing. Our due diligence has uncovered a string of racist posts made by one nominee on old online forums, and found that another nominee had a penchant for becoming embroiled in petty neighborhood disputes.

Having a comprehensive, holistic understanding of insurgent candidates is particularly important given the shift in 2022 to universal proxy cards, which require public companies with contested director elections to send shareholders a single ballot listing both incumbent and insurgent candidates. While the introduction of the universal proxy card has yet to unleash the wave of board turnover that we initially predicted, the ability to vote for individual candidates means that management can no longer argue against an insurgent slate en bloc. Further, a voting mechanism that allows shareholders to select individual candidates rather than cast an up-down vote on an entire slate underscores the importance of understanding individual candidates on their own merits.

More than a hunt for red flags

Identifying weaknesses in insurgent candidates is an obvious tactical benefit of thorough director due diligence. But the diligence process should be more than a hunt for red flags. **It is often the case that diligence, rather than yielding incriminating information, brings instead more complete knowledge of a candidate's business record, relationships and priorities.** This insight can be of significant strategic value, given that the majority of activist slates are resolved at the bargaining table before reaching a shareholder vote. If negotiations include naming one or more insurgent nominees to the board, the intelligence gathered in the due diligence process can allow management to argue for those candidates that management believes it can work with best. We recently provided a client defending against an activist campaign with insights into the insurgent slate, which helped the client negotiate a settlement with the activist that included dropping the proxy vote and expanding the board with a director amenable to both sides.

Due diligence should thus seek to bring management's level of understanding of each insurgent candidate to be as close as possible to management's understanding of their own candidates. (Similarly, management should subject its incumbent board to the same degree of diligence it undertakes for insurgent candidates, to better anticipate potential vulnerabilities in its board the activist may try to exploit.)

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Deeper insight into insurgent candidates also provides a strategic advantage when management is confronted by an activist without an extensive track record. The past several years have seen shareholder campaigns expand beyond a core group of well-established activists and hedge funds to include a greater number of “occasional activists,” including institutional investors and individuals, with social media providing a readily available platform for outreach². **Due diligence can provide clues about their motivation and playbook when the activists do not have a significant public profile.**

Insurgent slates are not merely a list of director nominees; such slates are an important—and very visible—component in the dialogue between activists and management. Due diligence of insurgent candidates is thus more than a box-checking exercise. When conducted with the appropriate resources and methods, it can provide management with critical tactical and strategic advantage, no matter how that dialogue plays out.

2 **“The Rise of the ‘Occasional Activist’,”** Spencer D. Klein, Tayler Miller and Lulu Sun, Morrison Foerster client alert, April 6, 2023.

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In addition to assisting in the oversight of the firm's pre-hire and corporate governance practice areas, Sean also leads investigations in complex litigation support, internal investigations, asset tracing and public policy disputes. Sean's cases have included impeaching the credibility of adverse nominees in proxy disputes, most recently in the real estate and pharmaceutical industries; uncovering the sources of activist campaigns against high profile clients; and discrediting adverse parties in white collar criminal defense, class-action and corporate civil litigation.

Sean has a BA in history from Bowdoin College and an MBA in finance from Johns Hopkins University.

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