



**SIDLEY**

September 16, 2022

**CORPORATE  
BOARD MEMBER®**

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# What to Do When (or Before) an Activist Knocks

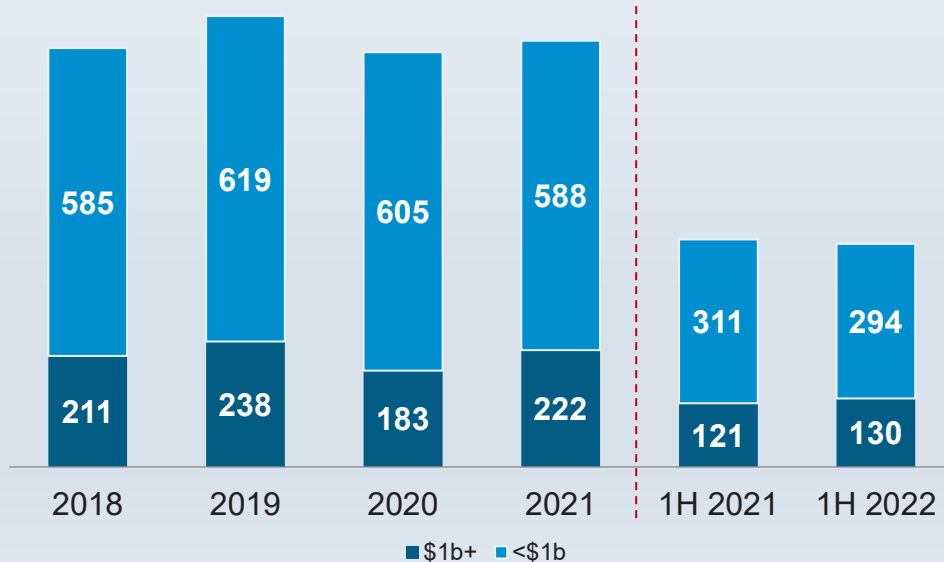
18<sup>th</sup> Annual Boardroom Summit, New York City

# Shareholder Activism in 2022: Campaign Volume

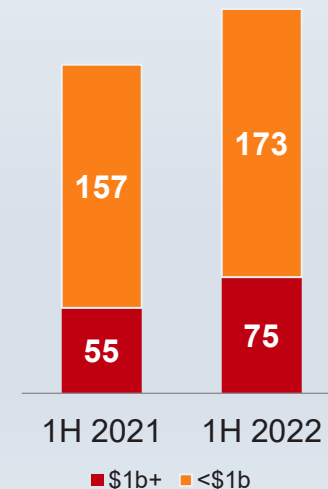
## Resurgence in Shareholder Activism

- 294 new campaigns launched in H1 2022, versus 311 campaigns in H1 2021 – Insignificant 5.5% decline
- Campaigns at \$1b+ companies were up 7% from 121 to 130 while sub-\$1b campaigns were down 14%
- The United States **has seen a resurgence in activism**
- U.S. Campaigns were up 10% from 157 in H1 2021 to 173 in H1 2022, and **\$1b+ campaigns were up 36%** from 55 to 75

Global Campaigns



U.S. Campaigns



Source: Bloomberg H1 2022 Global Activism Review.

# Shareholder Activism in 2022: Proxy Contests

**Boards Prevailed in the Majority of all Noteworthy Proxy Contests in 2022 to Date**

## 2022 Proxy Fight Outcomes

Outcome	H1 2022	H1 2021
Activist Won	6	3
Management Won	14	14
Split	-	4
Concessions	1	3
Withdrawn	16	13
No Follow Up	4	3
Sold Before Meeting	4	8
Settled	19	26

## Noteworthy Proxy Fights

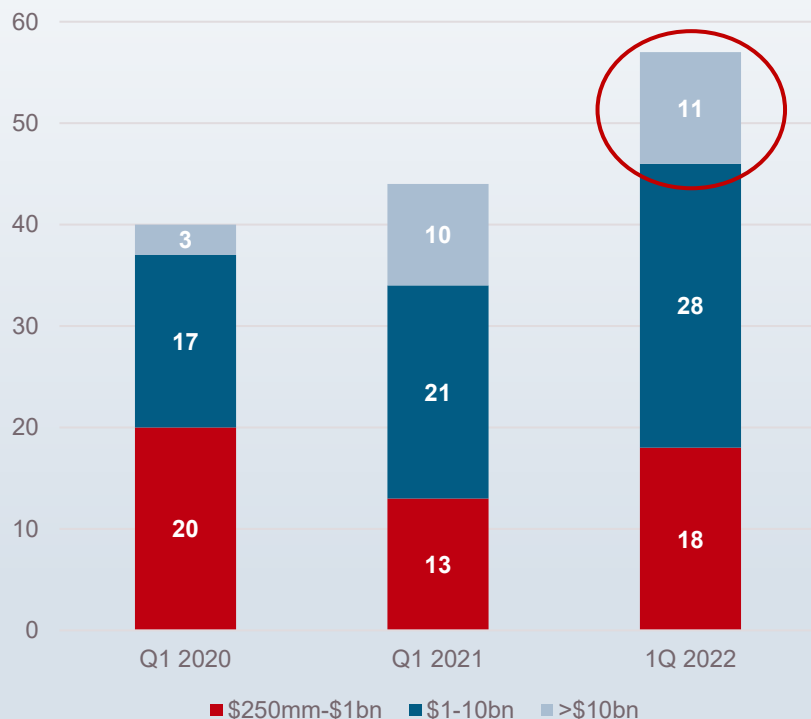


Source: Bloomberg H1 2022 Global Activism Review.

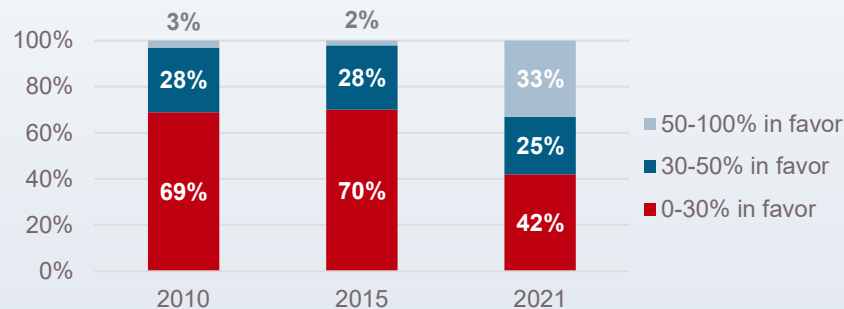
# Shareholder Activism in 2022: ESG

## Activist Funds Targeted Boards of Larger Companies With Increased Attention to ESG Matters

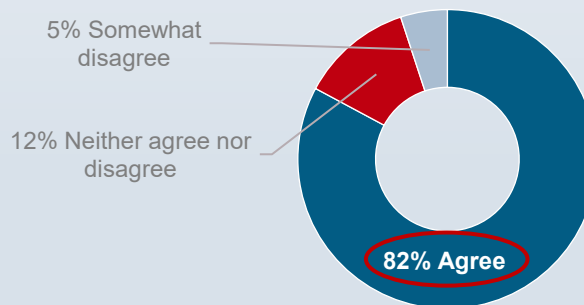
Q1 Shareholder Activism Campaigns<sup>(1)</sup> by Market Cap



% Votes in Favor of Climate-related U.S. Shareholder Proposals



Do Boards Consider “ESG” to be a Value Driver?<sup>(2)</sup>



(1) Represents the following campaign types in FactSet’s universe: “Board control and representation,” “Enhance corporate governance,” “Maximize shareholder value,” “Remove directors,” “Remove officers,” and campaigns in which board seats were granted despite the absence of publicly disclosed activism. Activist campaigns to vote against mergers are excluded. Data are for campaigns targeting U.S. companies with market capitalization greater than \$250mm, at time of campaign announcement.

(2) Survey samples 386 board members at J.P. Morgan’s 2021 Board Summit for public and private directors.

# The Universal Proxy

## The Universal Proxy will result in substantially more activism campaigns

### Neutral for Companies

- Sets up a “**candidate contest**,” where shareholders can choose preferred individual nominees
- **Greater emphasis on Board composition and nominee experience and skill set** (for both dissidents and companies): to be elected, nominees must have the right experience and skills in light of the Board’s needs

### Negative for Companies

- ✗ **Greater likelihood of at least a partial dissident victory**
  - Higher chance of ISS/Glass Lewis recommending for at least one dissident nominee
  - Vote splitting by institutional investors becomes more likely
- ✗ **Campaigns about board composition are credible even without a compelling strategic, financial or operational thesis** and more likely dissidents will attack companies who have one or two vulnerable directors or Boards that lack certain key skillsets
- ✗ Harder to achieve a **limited settlement** with activists
- ✗ More likely that traditional dissidents run **control slates**
- ✗ **Lower costs for dissidents to run campaigns** make it more likely that non-traditional activists (gadflies or special interest groups) run nominees on issue-based campaigns
- ✗ Possibly **more difficult for retail shareholders** to use correctly: for instance, voting for more than the number of seats available will invalidate all of the shareholder’s votes for director

### Positive for Companies

- ✓ Less likely that the company will **lose all or the majority of the seats up for election**
- ✓ If ISS/Glass Lewis recommend for a partial dissident slate, reduces the chance that more dissident nominees than recommended will be elected (i.e., less “unintended consequences”)

## Advance Preparation: Best Practices

- 1. Response Team:** Assemble a response team during peacetime to be on standby in the event of an attack; response team to monitor trends relevant to the company.
- 2. Communications Plan:** Prepare a “break the glass” communications plan with “shelf” press releases and media statements; prepare CEO and others for potential unexpected call(s) from an activist.
- 3. Activist Surveillance:** Retain a stock watch service to monitor trading in the company’s stock to receive advance notice if an activist builds a stake. Monitor other indicia of activist activity.
- 4. Board Composition Review:** Evaluate Board composition, skillsets and experience against articulated strategy and potential activist attack angles.
- 5. Financial Self-Evaluation:** With the assistance of a financial adviser and consultants, evaluate the strategy, capital allocation, and performance of the company like an activist would.
- 6. Legal Defense Review:** Ask experienced proxy fight counsel to review the charter and bylaws to assess legal strengths and weaknesses, including bylaw amendments to address the universal proxy.
- 7. Shelf Poison Pill:** Prepare an up-to-date, fully drafted and negotiated “shelf” poison pill to enable the board to react quickly in the event an activist attacks.
- 8. Corporate Governance/ESG Review:** Analyze the company’s corporate governance from a proxy campaign standpoint (board composition and practices, compensation, shareholder rights, related party transactions, etc.), as well as its ESG practices, as benchmarked against peers.
- 9. D&O Insurance Coverage:** Analyze the company’s D&O insurance policies and explore coverage for an activism campaign.
- 10. Tabletop Exercise:** Have a “mock campaign” session with senior management and board to educate them on how an activist campaign unfolds.

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