NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 100 JUNE 2025 NUMBER 3

ARTICLES

REWRITING THE RULES FOR CORPORATE ELECTIONS

BENJAMIN C. BATES*

Public company boards of directors have opened up a new front in their longstanding battle with hedge fund activists by rewriting the procedural rules governing board elections. Many boards now require shareholders to make long and complicated sets of disclosures in order to nominate candidates for board elections. These disclosure requirements—contained in advance notice bylaws (ANBs)—have come under fire in the Delaware courts for being drafted so expansively that they seem like "tripwires" intended to protect incumbents against even the possibility of a proxy contest.

In this paper, I analyze modern ANBs, drawing insights from a new dataset consisting of over 14,000 full sets of bylaws filed by more than 3,800 U.S. public companies from 2004 to 2023. During this time, ANBs have become longer and more complex market-wide, and variation in disclosure requirements across firms has increased. Additionally, firms with relatively few disclosure provisions have tended to add more provisions if they are targeted by an activist. These changes in drafting practice may have significant effects on corporate governance. When ANBs are long and complex with ambiguous requirements, it is more costly for activists to launch proxy contests, and boards are more insulated from outside pressure. This reduction in accountability is likely more severe for small firms and firms with high agency costs. However, modern ANBs also provide the benefit of filtering out campaigns by unsophisticated activists and bad actors.

* Copyright © 2025 by Benjamin C. Bates, Research Fellow, Harvard Law School Program on Corporate Governance. I am grateful to Lucian Bebchuk, Jens Frankenreiter, Zohar Goshen, Sott Grinsell, Lawrence Hamermesh, Mike Levin, Ann Lipton, and participants at the Harvard Law School Program on Corporate Governance Workshop, the 2024 National Business Law Scholars Conference, and the 2025 NYU Institute for Corporate Governance & Finance Spring Roundtable for helpful comments. I greatly appreciate Alon Brav's willingness to share data on hedge fund activism. I also thank Abbott Cooper, Andy Freedman, Leonard Wood, and several other practitioners (who asked to remain unnamed) who were willing to set aside time to discuss the history of advance notice bylaws and current practice with me. All errors are my own.

Legal reforms could reduce the costs associated with modern ANBs without eliminating their benefits. These include (1) requiring shareholders to approve ANB amendments, (2) requiring companies to give activists time to cure deficient nomination notices, and (3) allowing shareholders to facially challenge ANBs under an "overbreadth" theory. Recent efforts by shareholders also suggest that private ordering may curb some of the effects of modern ANBs without outside intervention.

Introduction

A central feature of Delaware corporate law is that boards of directors are responsible for managing the "business and affairs" of every corporation organized in the state.[1] But the shareholder franchise is the "ideological underpinning upon which the legitimacy of directorial power rests."[2] Boards only earn the right to wield vast amounts of economic power by being elected by their shareholders, and election contests are the most potent tool available to shareholders for holding directors accountable for the way they exercise their power. In recent years, battles between corporate boards and powerful shareholders over the future of some of America's most iconic businesses—including Disney,[3] Norfolk Southern,[4] and Exxon Mobil[5]—have been decided at the ballot box.

---

1 Del. Code Ann. tit. 8, § 141(a) (2020).

2 *See* Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

3 *See* Andrew Ross Sorkin, Ravi Mattu, Bernhard Warner, Sarah Kessler, Michael J. de la Merced, Lauren Hirsch & Ephrat Linvi, *The Takeaways from Disney's Board Fight with Nelson Peltz*, N.Y. Times (Apr. 4, 2024), https://www.nytimes.com/2024/04/04/business/disney-iger-peltz-proxy-battle.html [https://perma.cc/EG8D-6LB4].

4 *See* Josh Funk, *Activist Investor Wins 3 Norfolk Southern Board Seats but Won't Have Control to Fire CEO*, Associated Press (May 9, 2024), https://apnews.com/article/norfolk-southern-railroad-ancora-proxy-fight-2140f406923048faeee6bdcc035852dc [https://perma.cc/2N7W-ZBE9].

5 *See* Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/TCP3-9HDT].

The "hottest front" in the battle for control of U.S. public corporations has formed around shareholders' (usually hedge fund activists') power to nominate candidates for board elections.[6] Unless shareholders can nominate candidates to run against incumbent directors, their voting rights do not carry much weight.[7] However, over the past two decades, boards have put in place progressively more onerous requirements with which shareholders must comply in order to nominate election candidates. These requirements take the form of advance notice bylaws (ANBs) that require shareholders to notify the current board in advance of the upcoming election if they plan to nominate candidates.[8] ANBs usually also require each nominating shareholder to provide the board with basic information about themselves and their nominees.[9] If shareholders do not comply, ANBs give the board the power to keep the shareholders' nominees off of the firm's ballots.[10]

Simple ANBs have been used since at least 1980 and have regularly been upheld by the Delaware courts as necessary to promote orderly and informed elections.[11] But when financial markets collapsed and hedge fund activism soared during the 2008–09 financial crisis, a flurry

---

[6] Lawrence A. Cunningham, *The Hottest Front in the Takeover Battles: Advance Notice Bylaws*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 23, 2022), https://corpgov.law.harvard.edu/2022/10/23/the-hottest-front-in-the-takeover-battles-advance-notice-bylaws [https://perma.cc/TDN9-6QGT].

[7] Professor Lawrence Hamermesh opens his 2014 article titled "Director Nominations"—which includes some important, earlier analysis of ANBs—with this quote attributed to William "Boss" Tweed: "I don't care who does the electing, so long as I get to do the nominating." Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 117 (2014) (quoting SUSAN WELCH, JOHN GRUHL, JOHN COMER & SUSAN M. RIGDON, UNDERSTANDING AMERICAN GOVERNMENT: THE ESSENTIALS 181 (2009)). Boss Tweed was a nineteenth-century politician who headed the Tammany Hall political machine. *See Boss Tweed*, BRITANNICA (Aug. 27, 2024). "By 1860 he . . . controlled the Democratic Party's nominations to all city positions," and using this influence, he and his "Tweed ring" managed to "systematically plunder[] New York City of sums estimated at between $30 million and $200 million." *Id.*

[8] *See* Openwave Sys., Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 238–39 (Del. Ch. 2007) (describing ANBs as "provisions that require stockholders to provide the corporation with prior notice of their intent to nominate directors along with information about their nominees").

[9] *Id.* ("Advance notice bylaws . . . require stockholders to provide the corporation with prior notice of their intent to nominate directors along with information about their nominees.").

[10] *Id.* at 231 (describing use of an ANB to exclude shareholders' nominees).

[11] *See* Lerman v. Diagnostic Data, Inc., 421 A.2d 906, 909–10 (Del. Ch. 1980) (deciding a claim regarding the corporate defendant's advance notice bylaw); *Openwave Sys.*, 924 A.2d at 239 ("Advance notice bylaws are often construed and frequently upheld as valid by Delaware courts."); *id.* at 238–39 ("Advance notice bylaws . . . are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations.").

of bylaw amendments introduced a "second generation" of ANBs that substantially increased the amount of information that nominating shareholders were required to disclose.[12] In subsequent years, firms have continued to pile on disclosure requirements, some of which have become so invasive that former Chief Justice of the Delaware Supreme Court Leo Strine, Jr. compared compliance to "submit[ting] to a colonoscopy by the incumbents."[13]

Enhanced disclosure requirements in ANBs are the latest move by boards to tilt the balance of power in their favor in a long-running "legal cat-and-mouse game" between corporate boards and hedge fund activists.[14] Previous tactics have included adopting staggered boards and other defensive charter and bylaw amendments,[15] developing a new flavor of poison pills,[16] and advocating for policy changes, such as more stringent reporting requirements for Schedule 13D filers.[17] Changes in

---

12 Charles M. Nathan & Stephen Amdur, *Second Generation Advance Notice Bylaws and Poison Pills*, Harv. L. Sch. F. on Corp. Governance (Apr. 22, 2009), https://corpgov.law.harvard.edu/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills [https://perma.cc/3WU3-ZE8P].

13 Michael Flaherty & Tim Baysinger, *Overheard at 36th Tulane Corporate Law Institute*, Axios (Mar. 8, 2024), https://www.axios.com/2024/03/08/tulane-law-institute-delaware [https://perma.cc/L9VL-RMMG] (quoting former Chief Justice of the Delaware Supreme Court Leo Strine, Jr. speaking at the 36th Tulane Corporate Law Institute in 2024).

14 Patrick Temple-West, Sujeet Indap & Ortenca Aliaj, *US State Leads Pushback Against Company Moves to Thwart Proxy Fights*, Fin. Times (Jan. 9, 2024), https://www.ft.com/content/00a41bc1-d0c9-420e-87bc-7f781ab19fb1 [https://perma.cc/L28M-TQEQ].

15 *See, e.g.*, Stephen M. Gill, Kai Haakon E. Liekefett & Leonard Wood, *Structural Defenses to Shareholder Activism*, Rev. Sec. & Commodities Regul. 151, 155–56 (June 18, 2024), https://www.law.harvard.edu/programs/corp_gov/shareholder-engagement-roundtable-2015-materials/vinson-elkins_structural-defenses-to-shareholder-activism.pdf [https://perma.cc/9JMD-RALT] (describing defensive charter amendments and staggered board arrangements); Nicole M. Boyson & Pegaret Pichler, *Hostile Resistance to Hedge Fund Activism*, 32 Rev. Fin. Stud. 771 (2019) (describing firms' efforts to "modify[] their corporate charters or bylaws to restrict shareholder voting power").

16 *See generally* Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. Rev. 915 (2019) (providing a doctrinal and policy overview of the use of poison pills against corporate activists); Ofer Eldar, Tanja Kirmse & Michael D. Wittry, *The Rise of Anti-Activist Poison Pills* 1 (Eur. Corp. Governance Inst., Working Paper No. 869/2023) (describing the evolution of anti-activist poison pills); Christine Hurt, *The Hostile Poison Pill*, 50 U.C. Davis L. Rev. 137, 143 (2016) (providing an overview of innovations in poison pills).

17 *See, e.g.*, Letter from Wachtell, Lipton, Rosen & Katz to Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 1 (Mar. 7, 2011) (Re: Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934) (requesting that the Commission shorten reporting deadlines); Letter from Wachtell, Lipton, Rosen & Katz to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n 1–2 (Apr. 11, 2022) (Re: Comments on Release Nos. 33-11030; 34-94211; File Number S7-06-22) (requesting updates to the Schedule 13D filing system); Letter from Wachtell, Lipton, Rosen & Katz to Vanessa Countryman, Sec'y, Sec. & Exch. Comm'n (Oct. 4, 2022) (Re: Comments on Release Nos. 33-11030; 34-94211; File Number S7-06-22) (the same).

ANB practice have been significant because of how directly they target core shareholder rights.

In this paper, I analyze modern ANBs. After providing an overview of how ANBs are drafted and their function in election contests, I use a new dataset containing the ANBs of more than 3,800 U.S. public companies to trace the evolution of ANBs over the past two decades empirically. I do so by tracking ANB length, nomination deadlines, and the prevalence of sixteen different provisions. I then draw on economic reasoning to analyze how the changes in ANB drafting shown in the data affect election contests. I conclude by discussing options for legal reform that could reduce the costs of modern ANB practice without eliminating its benefits.

Modern ANBs have two main components: (1) a nomination window that sets the time period during which shareholders need to notify the board if they want to nominate directors for an election; and (2) a set of disclosure requirements that describe the information a nominating shareholder needs to provide the board alongside its notice. If a shareholder does not comply with a firm's ANBs, then the board can leave the shareholder's nominees off the company's proxy card and refuse to count votes cast in their favor. The board decides whether a notice is valid, and a shareholder's only recourse is to file a lawsuit challenging the board's decision.

From 2004 to 2023, ANB nomination windows across firms converged to a standard window: 90 to 120 days in advance of the expected election date.[18] Disclosure requirements, on the other hand, evolved very differently. First, disclosure requirements grew substantially longer and more complex market-wide,[19] and second, the level of variation in these requirements across firms increased.[20]

The widespread changes in disclosure requirements have been spurred on by both market forces and policy changes. The data show that disclosure requirements increased sharply market-wide in two distinct waves. The first (2008–09) followed the upsurge of hedge fund activism around the time of the financial crisis, and the second (2022–23) followed the SEC's adoption of universal proxy rules in 2021, which some commentators expected to "significant[ly] increase" the threat of proxy contests.[21]

---

18 *See infra* Section III.D.

19 *See infra* Section III.C.

20 *See id.*

21 *See* Kai Liekefett, Derek Zaba & Beth Berg, *SEC Dramatically Changes the Rules for Proxy Contests*, Harv. L. Sch. F. on Corp. Governance (Nov. 19, 2021), https://corpgov.law.harvard.edu/2021/11/19/sec-dramatically-changes-the-rules-for-proxy-contests [https://perma.cc/784W-PLN5]. The SEC's Universal Proxy rules require companies to use a universal

Firm-specific factors have also played a role in changing market practices. For reasons that are not entirely clear, large companies have led the revolution in market practice, consistently adopting more disclosure requirements than smaller firms over time.[22] Additionally, firms with comparatively few disclosure requirements tend to respond to being targeted by an activist by amending their ANBs to add more requirements.[23]

Over time, these changes to ANB disclosure requirements may reduce shareholder activism and board accountability. Long, complex, and ambiguous disclosure requirements increase the cost to shareholders of running a proxy fight. These types of requirements are expensive to comply with and increase the odds that nominating shareholders will end up in costly litigation. These costs loom particularly large in two settings: (1) in small companies, because an activist's economic stake is likely to be smaller relative to ANB-related costs; and (2) in companies with entrenched or disloyal boards, because vague and complicated disclosure requirements may give boards the power to toss out nomination notices from even credible activists.

As the cost of running a proxy fight increases, outside pressure and accountability for corporate managers decreases. When the threat of a proxy fight that normally backs an activist's demands for change becomes less credible, the incumbent board gains additional leverage in its negotiations with the activist and can more easily reject their demands.

Additionally, when ANBs vary widely across firms and evolve rapidly, it is more difficult for nonactivist shareholders to monitor and evaluate companies' corporate governance arrangements.[24] Many large

---

proxy card that lists both the company's board nominees and the dissident's nominees in any contested election. *Id.* This allows shareholders voting in board elections to "mix and match" candidates from both slates. Andrew J. Noreuil & Camila Panama, *The Universal Proxy Rules Are in Effect: Key Takeaways from Recent Proxy Contests and What to Watch*, Mayer Brown (Jan. 2023), https://www.mayerbrown.com/en/insights/publications/2023/01/the-universal-proxy-rules-are-in-effect-key-takeaways-from-recent-proxy-contests-and-what-to-watch [https://perma.cc/SX33-UE25].

22 *See infra* Section IV.A.

23 *See id.*

24 On institutional investor monitoring, see Ian R. Appel, Todd A. Gormley & Donald B. Keim, *Passive Investors, Not Passive Owners*, 121 J. Fin. Econ. 111, 111 (2016) ("Our findings suggest that passive mutual funds influence firms' governance choices . . . ."). On proxy advisors' voting guidelines, see Institutional S'holder Servs., Inc., United States Proxy Voting Guidelines 15 (2024) [hereinafter 2024 ISS Guidelines], https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/FRJ6-CXCK] (recommending voting against board members of companies who adopt arrangements "considered to be materially adverse to shareholder rights"); Glass Lewis, 2024 Benchmark Policy Guidelines 26–29 (2024) [hereinafter 2024 Glass Lewis Guidelines], https://www.glasslewis.com/wp-content/

institutional investors engage with or vote against companies in an attempt to improve their corporate governance.[25] But if governance practices are highly variable and always changing, it is more difficult for investors and advisors to benchmark and decide what practices they consider to be "good governance." This, in turn, makes it more difficult for investors to clearly express their preferences.

On the flip side, modern, complex ANBs may provide shareholders with important benefits. Orderly and well-informed elections help shareholders make value-maximizing voting decisions, so modern ANBs are beneficial to the extent they facilitate orderly, informed voting. Additionally, modern ANBs may allow boards to create value for their nonactivist shareholders by filtering out campaigns by activists who extract value from other stakeholders or damage companies' long-term growth.

Several legal reforms may reduce the governance costs associated with modern ANBs without eliminating their benefits. One possibility is to require shareholder approval of proposed ANB amendments. This change would allow all shareholders (not just activists) to clearly express their preferences about modern disclosure provisions, and it would limit companies' ability to change them opportunistically. Another possibility is requiring companies to provide activists with time to cure deficient nominations. This would reduce the cost of running a proxy fight to activists by reducing the risk of litigation. A third possibility would be for courts to allow shareholders to facially challenge ANBs on the grounds that they are "overbroad" and may have a chilling effect on activism. This doctrinal change would give shareholders more opportunities to force ANB changes through litigation and reduce boards' incentives to adopt sweeping disclosure requirements.

In evaluating the various options for policy reform, it is worth considering whether private ordering will eventually curb any excesses in ANB practice without the need for external intervention. In the most recent proxy season, several vocal shareholders have made ANBs a focal point and pushed companies to make changes.[26] Their efforts have included pushing companies to write into their ANBs a

uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [https://perma.cc/ZD9M-6R59] (recommending voting against members of the nominating and governance committee for certain governance-related concerns).

[25] For an empirical study of these engagements, see generally Dhruv Aggarwal, Lubomir P. Litov & Shivaram Rajgopal, *Big Three (Dis)Engagements* (Northwestern Law & Econ. Research Paper No. 23-17, Oct. 2024), https://ssrn.com/abstract=4580206 [https://perma.cc/Q2WY-6CKH].

[26] *See infra* Section V.E for a discussion of this movement.

time period for activists to cure deficient nominations.[27] Time will tell whether these movements have the force and momentum necessary to drive lasting change.

The rest of this article is organized as follows. Part I provides a brief history of shareholder activism. Part II describes how modern ANBs are structured, their role in election contests, and the legal limits on boards' authority to adopt and amend ANBs. Parts III and IV present the empirical evidence. Part V analyzes theoretically how changes in ANB practice might affect corporate governance and evaluates potential reforms.

I
A (Brief) History of Shareholder Activism

In this Part, I provide a brief history of changes in the market for corporate control and corporate defense practice over the past several decades. Understanding this history is crucial for understanding how ANBs came to be in their present form. I also review the policy debates that have surrounded these changes, many of which have carried over from debates about corporate takeovers in the 1980s and 1990s.

A. Hedge Fund Activism and Corporate Defenses

Broadly defined, shareholder activism includes any effort by shareholders to affect a company's management. Today, these efforts include informal conversations between large shareholders and CEOs, nonbinding proposals made by shareholders and voted on at companies' annual meetings, and campaigns by large hedge funds to oust companies' directors. Under this broad definition, some shareholder activism has "been around for as long as the existence of the stock market."[28] However, the dramatic "rise of shareholder activism" in its modern form began sometime in the mid-1980s and really took off in the 1990s.[29]

The rise of shareholder activism coincided with the development of a unique, high-profile, and potent brand of activism driven by hedge funds. In the typical case, an activist hedge fund buys a large position in an underperforming public company (around five to ten percent of outstanding shares), files Schedule 13D with the SEC announcing its

---

[27] *See infra* Section V.D.2 for a discussion of this campaign.

[28] Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and Market-based Shareholder Influence* 7–8 (Eur. Corp. Governance Inst., Working Paper No. 797/2021).

[29] *See* Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. Corp. Fin. 405, 407 (2017); *see also* Brav et al., *supra* note 28, at 4, 7–8.

position, and agitates for change.[30] For example, an activist might urge its target to sell a division,[31] merge with another company,[32] replace its CEO,[33] lay off employees,[34] or improve operations.[35] Sometimes, activist hedge funds communicate their views directly to management through behind-the-scenes meetings.[36] Other times, they take their arguments to the public using open letters, public presentations, social media, or shareholder proposals.[37] Activist hedge funds are also known for trying to place their own handpicked candidates onto company boards.[38] They do this by either persuading the current board to add their candidates directly or by running a "proxy fight," which means nominating their candidates for election at a regular shareholder meeting and soliciting proxy votes from shareholders.[39] Activist hedge funds' willingness to run proxy fights to replace incumbent boards is distinctive and gives hedge fund activism a more public and adversarial flavor than engagements by more passive shareholders.[40] Because hedge funds' engagements are backed by the often implicit threat of an election contest, they are particularly relevant to this Article's focus on elections.

Over the past thirty years, hedge fund activism has grown from being relatively rare to representing a significant part of the corporate governance ecosystem. Professors Alon Brav and Wei Jiang, two of the

30 Brav et al., *supra* note 28, at 25–36 (providing an overview of activist hedge fund tactics).

31 *See, e.g.*, Bill George & Jay W. Lorsch, *How to Outsmart Activist Investors*, Harv. Bus. Rev. (May 2014), https://hbr.org/2014/05/how-to-outsmart-activist-investors [https://perma.cc/NJ2E-R9NH] (discussing Pershing Square's attempt to convince Target to "spin off its credit card . . . [and] real estate operations").

32 *See id.* (discussing an attempt by Trian Fund Management to convince PepsiCo to acquire Mondelēz International).

33 *See* Wonik Choi & James Jianxin Gong, *Hedge Fund Activism, CEO Turnover and Compensation*, 39 J. Acct. & Pub. Pol'y art. no. 106774, at 1 (2020) (finding that CEO turnover is elevated "following hedge fund activism").

34 *See* Mark R. DesJardine & Rodolphe Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance*, 41 Strategic Mgmt. J. 1054, 1070 (2020) (presenting evidence suggesting that "after activist hedge funds acquire ownership, a firm's workforce steadily decreases").

35 *See* Brav et al., *supra* note 28, at 47–52 (finding that firm operating performance improves following activist interventions).

36 *See* Martin Lipton, Steven A. Rosenblum, Karessa L. Cain, Sabastian V. Niles & Anna Dimitrijević, *Dealing with Activist Hedge Funds and Other Activist Investors*, Harv. L. Sch. F. on Corp. Governance (Sept. 2, 2022), https://corpgov.law.harvard.edu/2022/09/02/dealing-with-activist-hedge-funds-and-other-activist-investors-5 [https://perma.cc/QLF3-35HY] (listing best practices for responding to non-public communication by activists).

37 *See id.* (listing "attack devices used by activists").

38 *See id.* (describing activist investors' efforts to "[r]ecruit candidates . . . to serve on dissident slates").

39 *Id.* (describing the typical proxy fight process).

40 *See* Brav et al., *supra* note 28, at 16 (explaining that high ownership and 13D filings give hedge funds "both credibility and visibility," while their willingness to use proxy contests and lawsuits makes their demands "more powerful" than those of other shareholders).

leading experts on hedge fund activism, and their coauthors have noted that the number of hedge fund activist campaigns rose from fewer than 100 per year prior to 1997 to over 300 in 2007.[41] They report that since 2010, "activist engagements" have leveled off at around 200 to 250 per year, which means that around three percent of public companies are targeted by activist hedge funds in any typical year.[42]

As hedge fund activists honed their craft, companies and their legal advisers began experimenting with a variety of tactics to defend against activists' attacks. Initially, many public companies held staggered director elections, so only a minority of directors could be replaced at any given annual meeting.[43] Staggered boards were originally used in conjunction with poison pills as a defense to hostile takeovers,[44] but they also worked brilliantly to limit the amount of influence that a hedge fund activist could win in a proxy fight. Eventually, however, institutional investors soured on staggered election schemes. Investor pressure in the early 2010s led many public companies with staggered boards to "destagger" their boards,[45] and today, a minority of public companies continue to hold staggered elections.[46]

When most directors began to face annual elections, the balance of power in corporate boardrooms swung toward hedge funds, and defense-side lawyers returned to the drawing board. They emerged with an updated version of the poison pill that had been used to shut down hostile takeovers in the 1980s. The classic poison pill stopped hostile takeovers by preventing "raiders" from buying more than a

---

41 *Id.* at 24.

42 *Id.*

43 *See* Lucian Ayre Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 Stan. L. Rev. 887, 889 (2002) (finding that 59% of a large sample of U.S. public companies had a staggered board in 1998).

44 *Id.* at 890.

45 *See* John C. Coffee, Jr., *Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?*, CLS Blue Sky Blog (Oct. 19, 2022), https://clsbluesky.law.columbia.edu/2022/10/19/proxy-tactics-are-changing-can-advance-notice-bylaws-do-what-poison-pills-cannot [https://perma.cc/SB32-LQ2C] (noting the "massive destaggering of corporate boards over the last decade"); *see also About*, S'holder Rts. Project (2019), http://www.srp.law.harvard.edu/index.shtml [https://perma.cc/UQ97-A2GF] (describing a Harvard Law School clinic that "assisted institutional investors . . . in moving S&P 500 and Fortune 500 companies towards annual elections" by filing "declassification proposals").

46 *See* Scott B. Guernsey, Feng Guo, Tingting Liu & Matthew Serfling, *Thirty Years of Change: The Evolution of Classified Boards* 1–3 (Eur. Corp. Governance Inst., Working Paper No. 929/2023) (surveying the evolution of takeover defenses over the last thirty years). The decline in staggered boards has been more pronounced among large firms and old firms. *Id.*

set percentage of the company's outstanding shares.[47] The classic pill did not work to stop hedge fund activists at first because most hedge fund activists bought smaller stakes than the limit set in poison pills.[48] New "anti-activist poison pills" addressed this issue by setting lower trigger thresholds (e.g., around ten percent of outstanding shares).[49] They also added "acting-in-concert provisions" designed to sweep in hedge funds that act together in "wolf packs," and they expanded the definition of equity ownership to include "synthetic or derivative positions" (which are commonly used by hedge funds).[50] These antiactivist poison pills began to be used widely during the COVID-19 pandemic, when many companies adopted them as a way to avoid distractions while their companies were, in their view, temporarily undervalued.[51] However, after some of the more aggressive provisions in these pills were criticized by the Delaware Court of Chancery,[52] the wave of antiactivist pills seems now to have subsided.

In an even more recent development, the SEC adopted new rules for proxy contests in 2021. The SEC's new Rule 14a-19 requires companies and activists to list all director candidates (including both the company's nominees and activists' nominees) on their proxy cards in contested elections.[53] This allows voting shareholders to "mix and match" directors from the competing slates, rather than having to pick all of the activist's candidates or all of the board's candidates.[54]

---

47 *See* Eldar, Kirmse & Wittry, *supra* note 16, at 8, 11–12 (explaining basic mechanics of poison pills and explaining that, from 2003 to 2007, most pills only triggered at fifteen percent ownership or higher).

48 Brav et al., *supra* note 28, at 118 (reporting that the seventy-fifth percentile maximum reported stake in the full sample of activist campaigns was 14.2%).

49 Eldar, Kirmse & Wittry, *supra* note 16, at 3.

50 *Id.*

51 *See generally* Ofer Eldar & Michael D. Wittry, *Crisis Poison Pills*, 10 Rev. Corp. Fin. Stud. 204 (2021).

52 *In re* Williams Cos. S'holder Litig., No. 2020-0707, 2021 WL 754593, at *16 (Del. Ch. Feb. 26, 2021) (holding that the defendants breached their fiduciary duty by imposing overly aggressive poison pill); *see also* Arthur H. Aufses III, Abbe L. Dienstag, Alan R. Friedman, Kerri Ann Law, Todd E. Lenson, Thomas E. Mohler, Jordan M. Rosenbaum, Jonathan M. Wagner & Jason M. Moff, *COVID-19 Pandemic and Poison Pills*, Kramer Levin (Mar. 26, 2021), https://www.kramerlevin.com/en/perspectives-search/covid-19-pandemic-and-poison-pills.html [https://perma.cc/V95R-E7Q9] (discussing the *Williams Companies* case).

53 17 C.F.R. 240 § 14a-19 (2021).

54 Andrew J. Noreuil & Camila Panama, *The Universal Proxy Rules Are in Effect: Key Takeaways from Recent Proxy Contests and What to Watch*, Mayer Brown (Jan. 2023), https://www.mayerbrown.com/en/insights/publications/2023/01/the-universal-proxy-rules-are-in-effect-key-takeaways-from-recent-proxy-contests-and-what-to-watch [https://perma.cc/9UWK-7REC].

These rules were expected by many to facilitate hedge fund activism by (1) reducing the cost and effort of running a proxy fight,[55] (2) creating uncertainty that would give activists increased leverage,[56] and (3) encouraging lesser-known or newer activists to launch campaigns.[57]

As I show throughout the remainder of this Article, advance notice bylaws grew in importance at the same time hedge fund activism was exploding and other defenses were proving less effective. During this time, ANB drafting practices changed dramatically. Additionally, the evolution of ANBs has been accelerated by regulatory changes, such as the introduction of the universal proxy card (UPC) rules.[58] Given the UPC rules' anticipated impact on activism, many law firms that advise boards have recommended that their clients review their ANBs in response to the rule change.[59]

---

55 Martin Lipton, Steven A. Rosenblum, Karessa L. Cain & Hannah Clark, *Thoughts for Boards: Key Issues in Corporate Governance for 2023*, Harv. L. Sch. F. on Corp. Governance (Dec. 1, 2022), https://corpgov.law.harvard.edu/2022/12/01/thoughts-for-boards-key-issues-in-corporate-governance-for-2023 [https://perma.cc/5HL8-FNPY] ("The universal proxy card will facilitate proxy contests by reducing the cost and effort required for activists to nominate and solicit proxies for the election of board members.").

56 Liekefett et al., *supra* note 21 ("Boards of directors may expect dissident shareholders to use the availability of the universal proxy card—and the uncertainty it creates—as an additional source of leverage.").

57 Louis L. Goldberg, William H. Aaronson & Ning Chiu, *Practical Takeaways of Universal Proxy Card*, Harv. L. Sch. F. on Corp. Governance (Nov. 9, 2022), https://corpgov.law.harvard.edu/2022/11/09/practical-takeaways-of-universal-proxy-card [https://perma.cc/2YGG-MZWB] ("[L]esser known or new activists will be encouraged to launch campaigns as the universal proxy card lowers the barriers to success for a minority slate campaign."). *But see* Ron Berenblat, Andrew Freedman & Dorothy Sluszka, *Open Letter to Directors and Activists Regarding Amendments to Advance Notice Bylaws*, Harv. L. Sch. F. on Corp. Governance (Nov. 30, 2022), https://corpgov.law.harvard.edu/2022/11/30/open-letter-to-directors-and-activists-regarding-amendments-to-advance-notice-bylaws [https://perma.cc/3799-6GEH] (arguing that "the universal proxy regime does NOT . . . make running a proxy contest easier").

58 *See, e.g.*, Berenblat et al., *supra* note 57 (noting the "concerning" trend of post-UPC ANB amendments); Ele Klein & Sean Brownridge, *(More) Observations on the Universal Proxy Card*, Harv. L. Sch. F. on Corp. Governance (June 6, 2024), https://corpgov.law.harvard.edu/2024/06/06/more-observations-on-the-universal-proxy-card [https://perma.cc/7BA9-L5TV] (same); Tiffany Fobes Campion, Christopher R. Drewry & Joshua M. Dubofsky, *8 Hot Topics in Activism*, Harv. L. Sch. F. on Corp. Governance (Feb. 29, 2024), https://corpgov.law.harvard.edu/2024/02/29/8-hot-topics-in-activism [https://perma.cc/4Y7T-N3DP] ("Over 60% of the S&P 500 have amended their bylaws to address the universal proxy rules, often adopting other advance notice enhancements simultaneously.").

59 *See, e.g.*, David M. Silk, Carmen X. W. Lu, Sabastian V. Niles, *Preparing for the 2023 Proxy Season in the Era of Universal Proxy*, Harv. L. Sch. F. on Corp. Governance (Nov. 14, 2022), https://corpgov.law.harvard.edu/2022/11/14/preparing-for-the-2023-proxy-season-in-the-era-of-universal-proxy [https://perma.cc/GGH3-9CXE] (advising firms to review their bylaws and consider appropriate amendments in response to the new universal proxy rules).

B. The Great Debate: Shareholder Rights vs. Board Primacy

Current debates about corporate governance and shareholder activism have their roots in the debates about corporate takeovers in the 1980s, when academics and practitioners debated the duties of board members in takeover scenarios.[60] Two main camps formed in the literature: a shareholder-centric camp that prioritized shareholders' voting rights, and a board-centric camp focused on upholding boards' delegated powers and discretion.

After the 1980s takeover wave subsided and hedge fund activism became more prevalent,[61] the same two camps restaked their positions in new debates about the desirability of staggered boards and the virtues of hedge fund activism.[62] The debate has continued, even as staggered boards have become less common and hedge fund activism has become a mature industry and an enduring part of the governance landscape.

Both sides of the boards-versus-shareholders debate have marshaled theory and evidence to support their claims. Shareholder rights advocates emphasize the "agency cost" theory developed by Professors Michael Jensen and William Meckling in their seminal 1976 paper *Theory of the Firm*.[63] According to this view, boards are tasked with running a company for the benefit of its shareholders but are often tempted to act in their own self-interest.[64] Giving shareholders rights

---

[60] For some early, canonical works this voluminous literature, see generally Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979) (arguing that whether to accept or reject a premium takeover bid should be a matter of the board's business judgment); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (arguing that boards should be passive in the face of a tender offer); Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982) (arguing that boards should not be fully passive in the face of an offer but should be allowed to solicit competing offers).

[61] Denes et al., *supra* note 29.

[62] For one recent example of this long-running back-and-forth, compare Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1090 (2015) (showing empirically that hedge fund activism has a positive, long-term effect on company performance), with Martin Lipton, Steven A. Rosenblum, Eric S. Robinson, Karessa L. Cain & Sabastian V. Niles, *The Bebchuk Syllogism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 26, 2013), https://corpgov.law.harvard.edu/2013/08/26/the-bebchuk-syllogism [https://perma.cc/KV6B-9FTU] (disputing the findings in the Bebchuk, Brav & Jiang study).

[63] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[64] *See id.* at 312–13 (providing an overview of the agency costs associated with the stockholder-manager relationship).

that allow them to oust underperforming or lazy board members is one way to limit these agency costs.[65]

Advocates of a board-first governance regime, however, take a different view. They emphasize a different model of the world where shareholders are ill-informed about companies' prospects, often short-sighted, and prone to take advantage of one another and the company's other stakeholders, including creditors, employees, customers, and suppliers.[66] Given shareholders' imperfections, board rights advocates argue that shareholders' rights should be limited and boards should be given ample discretion to act in what they deem to be their companies' best interests.[67]

Because there are sound logical bases for both views, researchers have attempted to determine empirically which view is a more accurate description of the world. The weight of the evidence coming out of these studies seems to be that hedge fund activism has positive effects (at least on average), though the results have been mixed. For example, many studies have documented that, on average, a company's stock price "pops" by three to seven percent around the time an activist makes a 13D filing announcing a position in the company, and this price increase does not appear to reverse over the subsequent one to three years or when the activist exits.[68] However, other studies have argued that this price increase does not reflect value-increasing activities by activists because the increase is mostly driven by companies that are acquired soon after the activist appears.[69] Another line of papers has

---

[65] *See* Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock . . . or they may vote to replace incumbent board members.").

[66] For a classic economic model analyzing imperfectly informed shareholders and managerial short-termism in takeover contexts, see generally Jeremy C. Stein, *Takeover Threats and Managerial Myopia*, 96 J. Pol. Econ. 61 (1988). For a more recent analysis of the social costs incurred when activists "mistarget" innovative firms, see generally Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 Yale L.J. 411 (2022).

[67] *See, e.g.*, Theodore N. Mirvis, Paul K. Rowe & William Savitt, *Bebchuk's "Case for Increasing Shareholder Power": An Opposition*, 120 Harv. L. Rev. F. 43, 43–44 (2007) (arguing in favor of Delaware's board-centric model, where shareholders have "very limited power to initiate corporate action").

[68] *See* Brav et al., *supra* note 28, at 37–41, 43–46 (reviewing this literature).

[69] *See* Robin Greenwood & Michael Schor, *Investor Activism and Takeovers*, 92 J. Fin. Econ. 362, 363 (2009) (presenting evidence that high documented returns associated with activist campaigns are driven by investor expectations that target firms will soon be acquired at a premium); Nicole M. Boyson, Nickolay Gantchev & Anil Shivdasani, *Activism Mergers*, 126 J. Fin. Econ. 54, 56 (2017) (finding no evidence that activism creates long-run value for investors in the absence of associated M&A activity); Andrew C. Baker, The Effects of Hedge Fund Activism 2 (Oct. 2021) (unpublished manuscript), https://andrewcbaker.netlify.app/publication/baker_jmp/Baker_JMP.pdf [perma.cc/HW6G-5TFU] (presenting results of

shown that activism increases companies' operating performance and productivity.[70] But, again, a handful of competing studies have found that activism has no impact or a negative impact on firm performance, investment, and employees.[71]

Despite the sheer quantity of research on hedge fund activism, a consensus view has yet to develop among academics, corporate law practitioners, and policymakers on whether hedge fund activism has a positive, negative, or neutral impact on companies' long-term performance and stakeholder wellbeing, on balance. This makes it very difficult to say conclusively whether legal arrangements that limit hedge fund activism are normatively desirable. Given these ongoing debates, for the rest of this Article, I include both views of hedge fund activism in my discussion of ANBs so that my analysis is useful to readers with differing viewpoints.

II
Advance Notice Bylaws: Structure and Function

In the early days of shareholder activism, some companies did not have bylaws that set ground rules for the director nomination process.[72] This meant that an activist could nominate directors at any time, right up until the shareholder vote at a company's annual meeting. The result could be incredibly disruptive. For companies, the process of preparing

empirical study consistent with claim that hedge fund activism pushes firms into takeovers); *see also* Brav et al., *supra* note 28, at 52–53 (reviewing this literature).

70 *See, e.g.*, Brav et al., *supra* note 28, at 47–49 (replicating and extending the analyses in Bebchuk et al., *supra* note 62, and finding that hedge fund activism improves common accounting performance metrics); Alon Brav, Wei Jiang & Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 Rev. Fin. Stud. 2723, 2723 (2015) (finding that plant and labor productivity improve after hedge fund activism and wages do not fall).

71 *See* DesJardine & Durand, *supra* note 34, at 1054 (finding that the benefits of activism are "shareholder-centric and short-lived" and that activism decreases investment spending and social performance); K.J. Martijin Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, Hedge Fund Activism and Long-Term Firm Value 1 (Dec. 13, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693231 [https://perma.cc/9XJK-J88F] (arguing that compared to nontargeted firms, hedge fund activism in fact decreases a firm's long-term value); Baker, *supra* note 69, at 52 (finding "little to no evidence" of any relationship between activism and improved firm operating performance); Guoli Chen, Philipp Meyer-Doyle & Wei Shi, *Hedge Fund Activism and Human Capital Loss*, 42 Strategic Mgmt. J. 2328, 2330 (2021) (finding that "firms affected by hedge fund activism experience a greater departure of valuable employees" than matched firms not targeted by hedge fund activists); Anup Agrawal & Yuree Lim, *Where Do Shareholder Gains in Hedge Fund Activism Come From? Evidence from Employee Pension Plans*, 57 J. Fin. & Quantitative Analysis 2140, 2142 (2022) (finding that pension underfunding increases at firms targeted by hedge fund activists relative to nontargeted firms).

72 *See* Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 42 (Del. Ch. 1998) (citing research showing that in 1998, only forty-six percent of large publicly-traded companies had "some form of advance notice by-law").

for a routine, uncontested annual meeting is very different than the process of preparing for a full-blown proxy fight. If an activist were to show up unannounced at a late stage in the game, the company and its advisers would have to scramble to get ready for a contest. As a concrete example, in contested elections, the SEC requires companies to file preliminary proxy statements at least ten days before they send definitive copies to shareholders.[73] In uncontested elections, however, companies do not need to file a preliminary statement and can just send the SEC a definitive copy when they start mailing to shareholders.[74] If an activist were to show up right before the company planned to mail out its definitive proxy statement, the company would have to delay mailing its proxy statement, disrupting the timing of the proxy solicitation process and perhaps the annual meeting.

To prevent these sorts of disruptions, companies started adding basic advance notice requirements to their bylaws. These provisions required shareholders (including activist hedge funds) to tell the company a certain amount of time in advance of the anticipated annual meeting date if they planned to nominate a competing slate of directors. If shareholders did not comply, boards reserved the right to reject the shareholders' nominees and not count votes in their favor.[75]

Over time, advance notice bylaws have evolved from their straightforward and relatively inauspicious beginnings into a complex tool for governing the nomination process.[76] In the following sections, I break down the structure and function of modern ANBs. I also discuss how they affect the incentives of shareholder activists to run proxy contests. Finally, I summarize the Delaware case law relevant to ANB practice.

A. Basic Components

Modern advance notice bylaws have two components: (1) a nomination window and (2) a set of disclosure requirements. The nomination window sets the deadline by which a shareholder must notify the company ahead of its annual meeting if they want to nominate directors. The disclosure requirements lay out the information a shareholder must send the company along with its nomination notice for the notice to be valid. The requirements usually call for information

---

73 *See* 17 C.F.R. § 240.14a-6.

74 *Id.*

75 *See supra* notes 10–11 and accompanying text.

76 *See* Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 136–37 (2014) ("Without great controversy or analysis, however, this sort of [advance notice] bylaw has become standard in U.S. public companies. . . . [T]hese bylaws have evolved substantially in recent years . . . .").

about the shareholder and the shareholder's intended nominees. Together, the nomination window and disclosure requirements give incumbent directors the time and information they need to prepare for the election contest, including by properly filing their proxy materials with the SEC.

1. Nomination Window

A typical ANB sets a 30-day window in advance of the annual meeting during which shareholders are allowed to notify the company about a forthcoming nomination. The most common configuration allows nominations to be made between 90 and 120 days prior to the anniversary of the previous year's annual meeting.[77] Because most companies hold their annual meetings on nearly the same day each year, this has the effect of setting the nomination deadline three months before the upcoming meeting. A minority of bylaws use as a reference point the actual date of the upcoming annual meeting.[78] Another minority variation sets the nomination window based on the anniversary of the date on which the company filed its previous definitive proxy statement.

The 90-to-120-day window is the most common window today, but some companies do use other windows. For example, some use 60 to 90 days, 120 to 150 days, or even lengthier deadlines.[79]

Additionally, because companies do not have to hold their annual meetings on the same day each year, companies that use their annual meeting anniversary date as a reference point tend to include a provision that adjusts the nomination window if the company decides to hold its annual meeting well before or after the anniversary date. The Walt Disney Company's bylaws provide a typical example: If Disney's upcoming meeting is scheduled for a date more than 30 days before

---

[77] *See, e.g.*, WALT DISNEY CO., AMENDED AND RESTATED BYLAWS OF THE WALT DISNEY COMPANY art. II, § 10(a)2 (2023), https://www.sec.gov/Archives/edgar/data/1744489/000174448923000232/fy2024_q1x8kxbylawsxex31.htm [https://perma.cc/2BRA-8YB7].

[78] This drafting variation caused trouble for a company in the 2015 case *Hill International, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30 (Del. 2015), which ended up turning on which day the company announced the precise date of its upcoming meeting (as opposed to the anticipated date). For a discussion of the case, see *Hill Int'l, Inc. v. Opportunity Partners L.P., No. 305, 2015 (Del. July 2, 2015)*, POTTER ANDERSON, https://www.potteranderson.com/insights/cases/Hill_Intl_Inc_v_Opportunity_Partners_July_2_2015 [https://perma.cc/3AT4-DRBQ].

[79] As an example of a particularly lengthy deadline, in 2018, the Nevada corporation BK Technologies filed bylaws with a nomination window set at 120 to 180 days before the anniversary of the company's last proxy mailing. BK TECHS., INC., SECOND AMENDED AND RESTATED BYLAWS art. I, § 1.2.2(a) (2018), https://www.sec.gov/Archives/edgar/data/2186/000165495418006262/rwc_ex3-2.htm [https://perma.cc/VL65-9XUM]. Because proxies are mailed weeks in advance of the annual meeting, this effectively means that nomination notices are due to BK Technologies nearly six months before the annual meeting.

or more than 70 days after the anniversary of its previous meeting, the deadline shifts. Nominations are then due by the later of two dates: (1) 90 days before the new meeting date or (2) 10 days after the new date is publicly announced.[80] Most bylaws use a similar structure.

2. Disclosure Requirements

Modern ANBs typically require disclosures about the shareholder making the nomination and the shareholder's proposed nominees.[81] In both cases, the disclosure requirements can usually be placed into one of three general buckets: (1) background or biographical information, (2) information about the individual's interests in the outcome of the election, and (3) "agreement[s], arrangement[s], or understanding[s]" the individual has with others that are relevant to the election.[82] Within these categories, companies have come up with an almost infinite variety of variations. To give some sense of the range of possibilities, here are some of the most common variations, along with a few of the more extreme:

a. Nominees' Basic Information

It is very common for ANBs to require shareholders to disclose all of the information about their nominees that they would be required to include in a definitive proxy statement.[83] Regulation 14A under the Securities Exchange Act of 1934 governs the solicitation of proxies. Its rules require activists to disclose certain information about their nominees to other shareholders in advance of contested elections.[84] This required information is listed under Item 5(b) of Schedule 14A and includes, for each nominee, (1) name and business address, (2) principal occupation, (3) whether the nominee has been convicted of a (non-traffic-related) crime in the past ten years, (4) company securities owned, (5) two-year trading history in company securities, (6) options positions, and (7) agreements with others regarding "future employment by the [company]" or "future transactions" involving the company.[85] In many cases, companies reference Regulation 14A in their bylaws. In other cases, companies' ANBs on their own require the same pieces of information.

---

[80] Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

[81] To cover cases where the formal nominating shareholder is making the nomination on behalf of another beneficial owner of the shares, many bylaws refer to "the stockholder giving the notice *and the beneficial owner, if any*." *Id.* (emphasis added).

[82] *Id.*

[83] *Id.*

[84] 17 C.F.R. § 240.14a-3 (2024).

[85] 17 C.F.R. § 240.14a-101, Item 5(b) (2024).

b. Shareholder's Basic Information

Most companies ask about the nominating shareholder's name, address, and shares owned.[86] As with basic information about the nominees, disclosure of much of this basic information is also required on Schedule 14A.[87] In addition, many companies ask for an explicit representation that the shareholder is "a holder of record of stock of the Corporation entitled to vote" at the upcoming meeting.[88] The requirement that the nominating shareholder be a shareholder of record is significant. Most investors hold stock "in street name with a broker-dealer," meaning that their name does not show up on the company's official list of shareholders.[89] Becoming a holder of record requires shareholders to put in a little bit of extra work and planning prior to making a nomination.[90]

c. Agreements, Arrangements, and Understandings ("AAUs")

Most companies ask for a description of AAUs between the shareholder and others that are related to the upcoming election.[91] Classic examples include agreements with other shareholders to vote a certain way in the election or agreements to buy or hold on to shares to increase or maintain voting power.[92] Another example would be a "golden leash" arrangement, whereby an activist hedge fund promises to pay its director nominees bonuses if (1) they are elected and (2) the target

---

86 Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

87 *See* 17 C.F.R. § 240.14a-101, Items 4(b), 5(b) (2024). The required information in Regulation 14A includes the identity (including name, business address, and occupation) of the activist soliciting proxies, the total expected cost of the proxy solicitation and whether the activist will seek reimbursement, any "substantial" direct and indirect interests in the election outcome (including "by security holdings" and with a two-year trading history) of the activist and their financial backers, and any "arrangement[s] or understanding[s]" between any person and the activist, their nominees, their financial backers, or their "associates" regarding "future employment" at the target company ("or its affiliates") or "future transactions" to which the target ("or any of its affiliates") "may be a party." *Id.*

88 Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

89 Off. of Inv. Educ. & Advoc., Sec. & Exch. Comm'n, & Fin. Indus. Regul. Auth., *Investor Bulletin: Holding Your Securities*, U.S. Sec. & Exch. Comm'n (July 12, 2023), https://www.sec.gov/about/reports-publications/investor-publications/holding-your-securities-get-the-facts [https://perma.cc/9AU5-AL66].

90 Alternatively, a beneficial shareholder could try to convince the shareholder of record to nominate someone on their behalf.

91 Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

92 *See, e.g.*, Sarah Jarvis, *Masimo Sues Founder Over Alleged 'Empty Voting' Scheme*, Law360 (Oct. 28, 2024), https://www.law360.com/articles/2252907/masimo-sues-founder-over-alleged-empty-voting-scheme [https://perma.cc/43RG-4XDG] (reporting on a lawsuit related to accusations that a company founder had an undisclosed agreement with a major shareholder to vote for the founder in a contested election).

company subsequently meets preset performance targets.[93] Most AAU provisions are drafted expansively to cover these classic arrangements and others that might be invented in the future. Companies also often make clear that the AAUs do not need to be in writing to be covered. Sometimes companies incorporate by reference parts (e.g., Items 5 and 6) or all of Schedule 13D, which mandates disclosure of voting groups and certain financial contracts by 13D filers.[94]

d. Derivative Positions

Most modern advance notice provisions require shareholders to disclose their positions in financial derivatives (such as swaps, futures, and options) that increase or hedge their exposure to the company's stock price or give them additional voting power.[95] Derivative disclosure provisions are a natural outgrowth of longer-standing requirements that shareholders disclose their share ownership. They close the loophole that would otherwise arise from the fact that, today, a variety of financial products can be combined to replicate share ownership without the activist owning shares directly.[96] Companies may also require proposed nominees to disclose their derivative positions.

e. Questionnaires

In addition to the disclosures required in their public bylaws, a growing number of companies ask each proposed nominee to complete and return a questionnaire. These questionnaires do not have a standardized format across companies and are available only upon request. Companies that require questionnaires usually obligate themselves to provide questionnaires to requesting shareholders within five or ten business days of receiving a request.[97] Because director questionnaires are not publicly available, it is not widely

---

93 *See* Andrew A. Schwartz, *Financing Corporate Elections*, 41 J. Corp. L. 863, 877–79, 920–22 (2016) (discussing "golden leash" arrangements and bylaws that would prohibit them); Martin Lipton, Theodore N. Mirvis, Andrew R. Brownstein, Steven A. Rosenblum, Trevor S. Norwitz, David C. Karp, William Savitt & Sabastian V. Niles, *Wachtell Proposes Bylaw to Ward Off Threat of Conflicted Directors*, CLS Blue Sky Blog (May 10, 2013), https://clsbluesky.law.columbia.edu/2013/05/10/wachtell-proposes-bylaw-to-ward-off-threat-of-conflicted-directors [https://perma.cc/LX9A-FWK7] (proposing a bylaw to prohibit "golden leash" arrangements).

94 17 C.F.R. § 240.13d-101 (2024).

95 Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

96 *See* Henry T.C. Hu & Bernard Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 13 J. Corp. Fin. 343, 344–45 (2007) (describing how "undisclosed economic ownership plus informal voting rights" can be created via derivatives).

97 Walt Disney Co., *supra* note 77, art. II, § 10(a)(2).

known what questions they contain. In a recent case involving activism at a closed-end fund, however, a director questionnaire became the subject of litigation, and the resulting court opinion provides some insight into the types of questions that were included. In *Saba Capital Master Fund, Ltd. v. BlackRock Credit Allocation Income Trust*,[98] Vice Chancellor Zurn described a 100-question questionnaire that asked about everything from whether the nominees had ever been accused of sexual misconduct or placed on academic probation to whether the nominees had ever participated in "[t]ransactions facilitating Iran's procurement or proliferation of conventional weapons or weapons of mass destruction."[99]

f. Performance-Related Fees

Less commonly, ANBs will require disclosure of "any performance-related fees" the shareholder is entitled to receive "based on any increase or decrease" in the company's share price.[100] Presumably, this would require an activist hedge fund to disclose the performance fees it earns based on its portfolio performance.

g. Interests in Competitors

Another relatively uncommon ANB variation requires disclosure of the nominating shareholder's interests in any "principal competitor" of the target company.[101] Those interests might include economic interests, like shareholdings or derivative positions, or contractual interests, such as "employment . . . or consulting agreement[s]."[102]

h. Related-Party Transactions

Some ANBs require disclosures about transactions between nominating shareholders and their nominees by referencing Item 404 under Regulation S-K, which "prescribes qualitative disclosure for a broad range of [securities] filings."[103] Item 404 requires the disclosure of transactions between companies and their "related persons" (e.g.,

98 No. 2019-0416-MTZ, (Del. Ch. June 27, 2019), *aff'd in part, rev'd in part*, 224 A.3d 964 (Del. 2020).

99 *Id.* at 13–16.

100 Crown Castle Int'l Corp., Amended and Restated By-laws of Crown Castle International Corp. art. II, § 2.07(a)(ii)(D) (2021), https://www.sec.gov/Archives/edgar/data/1051470/000105147021000171/exhibit32.htm [https://perma.cc/ZLS7-TESE].

101 AIM Immunotech, Inc., Restated and Amended Bylaws of AIM Immunotech Inc. art. I, § 1.4(c)(2)(B) (2023), https://www.sec.gov/Archives/edgar/data/946644/000149315223010351/ex3-7.htm [https://perma.cc/H53L-ZJDC].

102 *Id.*

103 *Regulation S-K*, Cornell L. Sch. Legal Info. Inst. (Jan. 2022), https://www.law.cornell.edu/wex/regulation_s-k [https://perma.cc/M382-XD2J].

officers and directors) that involve amounts greater than $120,000.[104] (These could include loans, for instance.) Companies import the requirements of Item 404 into their ANBs by requiring nominating shareholders to disclose transactions as if the nominating shareholder "were the 'registrant' for purposes of [Item 404] and the proposed nominee were a director or executive officer of such registrant."[105]

i. Affiliates, Associates, Family Members, and Others Acting in Concert

One technique used by an increasing number of companies to significantly widen the scope of their disclosure requirements involves requiring shareholders to make disclosures, not only about themselves and their nominees, but also about their "Affiliates," "Associates," and "immediate family" members and "any person acting in concert with" the nominating shareholder.[106] Terms like "acting in concert," "affiliate," and "associate" may or may not be defined.[107] They can also be multiplied against each other to create "daisy chains," which extend disclosure requirements to third parties who are potentially unknown to even the nominating shareholder if those third parties are linked to parties who are themselves linked to the shareholder.[108] Bylaws with

104 17 C.F.R. § 229.404(a) (2022).

105 Crown Castle Int'l Corp., *supra* note 100, art. II, § 2.07(a)(ii)(A); *see also* AIM Immunotech, Inc., *supra* note 101, art. I, § 1.4(c)(1)(J).

106 AIM Immunotech, Inc., *supra* note 101, art. I, § 1.4(c)(1); *see also* Crown Castle Int'l Corp., *supra* note 100, art. II, § 2.07(a)(ii)(A).

107 For example, Crown Castle's August 2021 bylaws defined "Acting in Concert," Crown Castle Int'l Corp., *supra* note 100, art. II, § 2.07(c)(vii), but AIM Immunotech's March 2023 bylaws left the term undefined. *See generally* AIM Immunotech, Inc., *supra* note 101. One controversial definition of "Acting in Concert" includes a so-called "wolf pack provision," which covers consciously parallel behavior between activists even if they have not made an agreement to act together. *See* Laura Hughes McNally, Michael D. Blanchard, Joanne R. Soslow & Celia A. Soehner, *Plaintiffs' Firms Extracting Fees Based on Newly Invalidated Advance Notice Bylaw Provisions*, Morgan Lewis (Mar. 6, 2024), https://www.morganlewis.com/pubs/2024/03/plaintiffs-firms-extracting-fees-based-on-newly-invalidated-advance-notice-bylaw-provisions [https://perma.cc/4VGJ-UJ35] (discussing recent legal challenges to these provisions). "Affiliate" and "Associate" are sometimes defined with reference to "Rule 12b-2 under the Exchange Act." AIM Immunotech, Inc., *supra* note 101, art. I, § 1.4(h)(i)(1)–(2).

108 *See* Stephen F. Arcano, Marc S. Gerber, Edward B. Micheletti & Richard J. Grossman, *Delaware Court Enjoins an 'Extreme' Stockholder Rights Plan*, Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 4, 2021), https://www.skadden.com/insights/publications/2021/03/delaware-court-enjoins-extreme-stockholder-rights [https://perma.cc/LW43-W7EX] (explaining the use of "daisy chain" provisions in anti-activist pills). For example, the company Crown Castle's definition of "Acting in Concert" includes the following daisy chain language: "A person Acting in Concert with another person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other person." Crown Castle Int'l Corp., *supra* note 100, art. II, § 2.07(c)(vii).

these expanded disclosure requirements are sometimes drafted with a defined term like "Proposing Person"[109] or "Stockholder Associated Person"[110] that lists the other parties for whom disclosure is required. This defined term is then inserted throughout the other ANB provisions, such as the AAU provision and the provisions requiring disclosure of derivative positions.

j. Known Supporters

One particularly rare provision mandates disclosure of "the names . . . and addresses of other stockholders . . . known by any [stockholder] to support" the nomination and, "to the extent known," the number of company shares owned by these supporting shareholders.[111] These provisions do not specify what it means to "support" the nomination.[112]

k. Universal Proxy Card-Related Disclosures

A recent innovation to ANB practice has been for companies to include references to the SEC's new Universal Proxy rules in Rule 14a-19 under the Exchange Act. These rules added several proxy solicitation requirements for activists. For example, Rule 14a-19 sets forth some deadlines for giving notice to the SEC and the company that the election will be contested, and it requires activists to "[s]olicit[] the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors."[113] Many companies have included provisions in their ANBs that either directly copy the requirements from Rule 14a-19 or require activists to represent that they will comply (and sometimes provide "reasonable documentary evidence" that they have complied) with the 14a-19 requirements.[114]

The disclosure categories I have discussed cover most of the requirements found in modern ANBs. However, they are not exhaustive, and the practice is constantly evolving. For example, a recent law firm analysis mentioned a growing trend toward requiring nominating shareholders to "update and supplement their disclosures in the days

109 Crown Castle Int'l Corp., *supra* note 100, art. II, § 2.07(a)(ii)(A).

110 AIM Immunotech, Inc., *supra* note 101, art. I, § 1.4(h)(i)(8).

111 *Id.* art. II, § 1.4(c)(4).

112 *See id.*

113 17 C.F.R. §§ 240.14a-19(a)(3), (b)(1) (2021).

114 *See, e.g.*, Walt Disney Co., *supra* note 77, art. II, § 10(a)(2). It is interesting to note that Rule 14a-19 also includes an advance notice component. *See* 17 C.F.R. § 240.14a-19 (2021). It sets a nomination deadline at 60 calendar days before the anniversary of the company's previous annual meeting using language nearly identical to most ANBs. 17 C.F.R. § 240.14a-19(b)(1) (2021). It also includes a reset provision. *Id.* Since most companies have longer deadlines, the 14a-19 deadline is only binding for the small number of companies without ANBs or with unusually short deadlines.

prior to the shareholder meeting[,]"[115] and some companies are now requiring activists to make their nominees available to be interviewed by the incumbents.[116] Finally, other companies opt not to list many disclosure requirements at all and instead require nominees to disclose whatever information the company "reasonably request[s] within ten (10) business days of such request."[117]

One recent set of ANBs is worth mentioning because of how far it pushed the boundaries of market practice. ANBs adopted by the health tech company Masimo Corporation ahead of a proxy fight launched by the hedge fund Politan Capital would have required Politan to disclose "the identities of [its] limited partners" (i.e., its investors) and its "plans for nominations at other companies."[118] These provisions created a stir in academic circles and among practitioners because they were viewed as effectively impossible for Politan to comply with.[119] Private investment funds commit to keeping their investors' identities private, often through provisions in their investment contracts.[120] Additionally, hedge funds' future investment plans are kept in the strictest confidence because disclosing them before the fund can act could ruin their viability.[121] Ultimately, Masimo removed these extreme provisions,[122] and Politan was able to nominate two director candidates (whom shareholders subsequently elected to Masimo's board).[123]

---

115 Douglas K. Schnell & Daniyal Iqbal, *Lessons from the 2023 Proxy Season: Advance Notice Bylaws and Officer Exculpation*, Harv. L. Sch. F. on Corp. Governance (Sept. 5, 2023), https://corpgov.law.harvard.edu/2023/09/05/lessons-from-the-2023-proxy-season-advance-notice-bylaws-and-officer-exculpation [https://perma.cc/PQ5E-V6Z8] (citing Wilson Sonsini Goodrich & Rosati client memo).

116 *See id.* (noting that of the fifty Silicon Valley 150 companies that amended their bylaws to address Rule 14a-19, "14 percent added a requirement that director nominees sit for interviews with the company's board of directors or one of its committees").

117 *See, e.g.*, American International Group, Inc., By-laws art. I, § 1.12(a)(4) (2020), https://www.sec.gov/Archives/edgar/data/5272/000110465920133692/tm2038104d1_ex3-1.htm [https://perma.cc/DA3E-77KK].

118 Cunningham, *supra* note 6.

119 *See id.* (describing the provisons as "Draconian showstoppers").

120 *See id.*

121 *Id.* ("Maintaining the confidentiality of such efforts is essential to the successful deployment of capital. Compelling its disclosure undermines the business model, providing a Draconian deterrent to nominate a director.").

122 Svea Herbst-Bayliss, *Masimo Reverses Bylaws Requiring Detailed Activist Information*, Reuters (Feb. 6, 2023, 2:29PM), https://www.reuters.com/business/healthcare-pharmaceuticals/masimo-backs-off-bylaw-amendments-requiring-detailed-information-activists-2023-02-06 [https://perma.cc/LZ3B-3SCD].

123 *See Schulte Secures Significant Victory Against Masimo Corp. for $1775 Million "Mootness" Fee*, Schulte Roth + Zabel (Nov. 21, 2023), https://www.srz.com/en/news_and_insights/firm-news/schulte-secures-significant-victory-against-masimo-corp-for-dollar1775-million-mootness-fee [https://perma.cc/4YSP-3EVA].

B. Function in Election Contests

ANBs come into play in a proxy contest after an activist has picked a target, decided that it wants to run (or have the option of running) a proxy contest, and selected its nominees. At that point, the activist must comply with the company's ANBs to open the door to running the contest. Doing this usually involves hiring a law firm to parse the ANBs, draft a nomination notice, and submit the notice to the target company within the nomination window. If the target company requires nominating shareholders to fill out a questionnaire along with their notice, there is an additional step.[124] The shareholder must reach out to the target board before they intend to submit their notice to request a questionnaire. The target board then provides the questionnaire (perhaps after a delay), which the activist returns alongside the notice.

After the board receives the activist's nomination notice (and perhaps its questionnaire), the board reviews the notice and questionnaire to determine whether they comply with the ANBs. If the board determines that the notice is valid, then the proxy fight continues and the ANBs are no longer relevant. But if the board determines that the notice is invalid, things become more complicated.

Boards have essentially two options for dealing with invalid notices. One option is that the board can ignore the deficiencies and allow the proxy contest to continue. This may be the wisest course of action in some cases, especially when the deficiencies are minor or technical and the board does not want to invite a lawsuit. The other option is that the board can reject the nomination. If the board notifies the shareholder that the nomination notice is deficient before the nomination window closes, then the shareholder has an opportunity to correct the deficiencies and resubmit their notice. But if the board waits until after the nomination window has closed to reject the notice, then the shareholder cannot resubmit, and their only recourse is to file a lawsuit challenging the board's decision to reject the notice.

Shareholders must resort to suing the target board if their nomination is rejected because boards generally have sole authority to decide in the first instance whether a notice is invalid. Additionally, the SEC has taken the position that, if a board rejects a nomination for failure to comply with the company's ANBs, then the board is not required to list the shareholder's nominees on the company's universal proxy card.[125] Further, even if the shareholder files a lawsuit challenging

---

124 *See supra* notes 90–92 and accompanying text.

125 *See Proxy Rules and Schedules 14A/14C*, U.S. Sec. & Exch. Comm'n, at Question 139.04 (Nov. 17, 2023), https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/proxy-rules-schedules-14a14c [https://perma.cc/SS7M-K5NX].

the board's determination, the SEC still does not require boards to list the shareholders' nominees on their proxy cards until the "shareholder's nominations are ultimately deemed to be valid" in court.[126] Until the final judicial decision, the board is required only to disclose the basis for its determination that the nominations were invalid, the existence of the lawsuit, and possible consequences.[127] If the nomination is ultimately deemed to be valid, then the company is required to distribute new proxy cards with the shareholder nominees listed and hold a new vote, likely at a later date.[128]

C. Legal Limits on Boards' Authority to Adopt and Enforce

State corporate law determines who within a corporation can adopt and amend ANBs. It also places limits on what provisions can be adopted—and in what circumstances—and on how ANBs can be enforced. Therefore, it is necessary to understand the state law rules on ANB adoption and enforcement to understand why ANBs have evolved the way they have and whether reform would be useful. Throughout this paper, I focus on Delaware law because most public companies, by a wide margin, are incorporated in Delaware,[129] and thus Delaware corporate law often influences the law in other jurisdictions.[130]

Under section 109(a) of the Delaware General Corporation Law (DGCL), corporations can place a provision in their charter (certificate of incorporation) granting the board of directors the power to "adopt, amend or repeal bylaws."[131] Almost all corporate boards of large, publicly traded Delaware corporations have adopted this provision.[132] Additionally, section 109(b) explains the types of provisions corporate bylaws can contain, and it places essentially no limits on ANBs: "The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation,

126 *See id.* at Question 139.05.

127 *See id.*

128 *See id.*

129 *See infra* notes 187–88 and accompanying text.

130 *See* Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, Harv. L. Sch. F. on Corp. Governance (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations [https://perma.cc/22DK-7XBR] ("No state comes close to Delaware in the depth and breadth of corporate case law, and Delaware cases are routinely cited by courts in every state.").

131 Del. Code Ann. tit. 8, § 109(a) (2020).

132 *See* Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 Iowa L. Rev. 1, 4 n.6 (2018) ("Almost all large, publicly traded corporations that are incorporated in Delaware have the express provision in their charters granting the right to amend bylaws to the directors.").

the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[133]

Boards' ability to unilaterally adopt ANBs creates the possibility that they would use this power to further their own interests at the expense of shareholders, for example, by entrenching themselves against shareholder activists. Delaware law guards against these types of abuses by allowing shareholders to challenge boards' decisions to adopt, amend, or enforce ANBs as breaches of the boards' fiduciary duties.

In a recent case, *Kellner v. AIM ImmunoTech Inc.*,[134] the Delaware Supreme Court clarified the framework that Delaware courts use to evaluate claims that a board of directors breached its fiduciary duties by adopting or enforcing certain ANB provisions. Under the framework articulated in *Kellner*, all challenged ANB amendments and enforcements are "twice-tested," first to see whether they are legal, and second to see whether they are equitable.[135] The second test has two steps.

The first (legal) test requires the court to assess whether the challenged bylaws are facially valid.[136] According to the *Kellner* court, bylaws are "presumed to be valid" in Delaware,[137] and "[a] facially valid bylaw is one that is 'authorized by the Delaware General Corporation Law (DGCL), consistent with the corporation's certificate of incorporation, and not otherwise prohibited.'"[138] The court added that the burden is on the plaintiff to "demonstrate that the bylaw cannot operate lawfully under *any* set of circumstances."[139] It is not enough for the plaintiff to show that "under some circumstances, a bylaw might conflict with a statute, or operate unlawfully."[140]

In practicality, under this standard, almost all ANBs are facially valid because, as previously mentioned, the DGCL places very few limits on what companies can put in their bylaws.[141] This is important because it means that shareholders generally cannot force a company to walk back bylaw amendments they do not like via litigation. Their only options, therefore, for challenging bylaws they dislike are (1) bringing

---

133 Del. Code Ann. tit. 8, § 109(b) (2020). By contrast, Pennsylania's corporation statute includes a requirement that ANBs be "fair and reasonable." 15 Pa. Cons. Stat. § 1758(e) (2023).

134 *See* Kellner v. AIM ImmunoTech, Inc. (*Kellner II*), 320 A.3d 239 (Del. 2024).

135 *Id.* at 259.

136 *Id.*

137 *Id.* at 258. (quoting Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985)).

138 *Id.* (quoting ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 at 557–58 (Del. 2014)).

139 *Id.* (emphasis added).

140 *Id.* at 258 (quoting *Deutscher Tennis Bund*, 91 A.3d at 557–58).

141 *See supra* notes 131–33 and accompanying text.

as-applied challenges in specific activist situations (discussed below) or (2) coordinating to amend the bylaws via shareholder vote,[142] which is very difficult.

In *Kellner*, the court found only one of the challenged ANB provisions to be facially invalid, and that was because the provision was "indecipherable."[143] That provision required the nominating stockholder and "Stockholder Associated Person[s]" to disclose their shareholdings and derivative positions in the target company and any of its "principal competitor[s]."[144] None of these individual building blocks is particularly uncommon, but the provision combining them consisted of a "1,099-word run-on sentence of 13 subsections."[145] The board chairman himself apparently admitted "that the bylaw was written in such a way that 'no one would read it,'"[146] and the Vice Chancellor who initially heard the case remarked that she could not understand the provision.[147]

The second (equitable) test in the *Kellner* framework requires the court to determine whether the challenged ANB amendment or enforcement was "equitable under the circumstances of the case."[148] The test follows Delaware's two-step "enhanced scrutiny" standard of review, as articulated in the recent case *Coster v. UIP Companies, Inc*.[149]

In step one of the *Coster* analysis, "the court should review whether the board faced a threat 'to an important corporate interest or to the achievement of a significant corporate benefit.' The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal." Finally, the threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders"[150]

In ANB cases, the Delaware courts rarely discuss whether the board is facing a legitimate "threat" because the courts have long concluded

---

142 Shareholders have the power to "adopt, amend or repeal bylaws" under section 109(a) of the DGCL. *See* Del. Code Ann. tit. 8, § 109(a) (2020).

143 *Kellner II*, 320 A.3d at 263 (quoting Kellner v. AIM ImmunoTech, Inc. (*Kellner I*), 307 A.3d 998, 1034 (Del. Ch. 2023), *aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024)).

144 *Id.* at 253.

145 *Id.*

146 *Id.* at 263 (quoting *Kellner I*, 307 A.3d at 1034).

147 *See id.* at 263 n.161 (citing *Kellner I*, 307 A.3d at 1034) ("Though I have tried to read and understand it, the bylaw—with its 1,099 words and 13 subparts—is indecipherable.").

148 *Id.* at 246.

149 *See* 300 A.3d 656 (Del. 2023). *Coster* merges together tests developed in three older cases: Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988); and Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971). *See Kellner II*, 320 A.3d at 259 ("In *Coster v. UIP Companies, Inc.*, we folded *Schnell* and *Blasius* review into *Unocal* enhanced scrutiny review when a board interferes with a corporate election or a stockholder's voting rights in contests for control.").

150 *Coster*, 300 A.3d at 672.

that ANBs are "commonplace"[151] and serve a useful purpose.[152] Instead, the focus is on whether the board acted with the improper motive of "precluding a challenge to its control."[153]

Delaware courts examine a variety of factors to assess boards' motives. For example, in adoption and amendment cases, the courts look at (1) whether the board acted on a "clear day" or in the face of a known contest (i.e., on a rainy day), (2) the record of the board's decisionmaking process, (3) the board's stated rationale, and (4) the adopted ANB provisions themselves.[154] In enforcement cases, the courts also look at the information supplied by the activist and the activist's reputation and motives.[155] If the reviewing court concludes that a board adopted, amended, or enforced its ANBs for an improper purpose, "the remedy is to declare the [ANBs] inequitable and unenforceable" against the plaintiff.[156]

In *Kellner*, the Delaware Supreme Court concluded that the AIM board had amended its ANBs for an improper purpose.[157] The court's reasoning was based on the facts that the AIM board amended its ANBs "[i]n the middle of a proxy contest" and added "one unintelligible bylaw"[158] and three other bylaws that the lower court found seemed "designed to thwart an approaching proxy contest."[159] The three "unreasonable" provisions were an AAU provision, a Known Supporter provision, and a variation on the AAU provision referred to as the "Consulting/Nomination Provision."[160] Importantly, all of these provisions included a defined term ("Stockholder Associated Person") that dramatically widened their scope to cover, for instance, parties affiliated, associated, or acting in concert with the nominating

---

151 Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 42 (Del. Ch. 1998).

152 *See* Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 239 (Del. Ch. 2007) ("Such bylaws are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations.").

153 *Kellner II*, 320 A.3d at 260.

154 *See id.* at 253–55.

155 *See, e.g.*, Paragon Techs., Inc. v. Cryan, No. 2023-1013-LWW, 2023 WL 8269200, at *7–15 (Del. Ch. Nov. 30, 2023); BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd., 224 A.3d 964, 976–82 (Del. 2020).

156 *Kellner II*, 320 A.3d at 260.

157 *Id.* at 267 ("As the product of an improper motive and purpose, which constitutes a breach of the duty of loyalty, all the Amended Bylaws at issue in this appeal are inequitable and therefore unenforceable.").

158 *Id.* at 264.

159 *Id.* at 267 (quoting *Kellner I*, 307 A.3d 998, 1036 (Del. Ch. 2023)).

160 *Id.* at 265 ("The provision required disclosure of AAUs spanning a ten-year window 'between the nominating stockholder or an SAP, on one hand, and any stockholder nominee, on the other hand, regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years.'" (quoting *Kellner I*, 307 A.3d at 1031)).

shareholder, as well as family members of these parties.[161] The provisions were described by the Court of Chancery as "draconian"[162] and "akin to a tripwire"[163] because, as the Delaware Supreme Court subsequently noted, they sought information about a "potentially limitless class of third parties and individuals unknown to the nominator,"[164] were susceptible to "subjective interpretation,"[165] "imposed ambiguous requirements across a lengthy term,"[166] and "sought only marginally useful information."[167] As an illustration, at the Chancery stage, the Vice Chancellor suggested that the provisions would cover a situation where "the mother of an associate of a beneficial holder had an agreement with the estranged sister of a nominee to finance the nomination of a third-party nominee to the Board (who is unknown to both the nominating stockholder and the nominee)."[168] Based on these findings by the Court of Chancery, the Delaware Supreme Court concluded that all ANBs at issue in the case—including those that it did not explicitly find unreasonable—were "inequitable and therefore unenforceable."[169]

If a court concludes that the target board did not amend or enforce its ANBs for a proper purpose (as in *Kellner*), then its analysis ends. But if the board's purpose was proper, the court proceeds to *Coster*'s second step, which asks "whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive

---

161 The definition of "Stockholder Associated Person," as reproduced in the Chancery Court opinion, includes "any person" acting in concert with the nominating shareholder "with respect to the Stockholder Proposal or the Corporation," "any person controlling, controlled by, or under common control with such Holder or any of their respective Affiliates and Associates, or a person acting in concert therewith with respect to the Stockholder Proposal or the Corporation," and "any member of the immediate family" of such nominating shareholders, their affiliates, or their associates. *Kellner I*, 307 A.3d at 1029.

162 *Id.* at 1031.

163 *Id.* at 1030.

164 *Kellner II*, 320 A.3d at 265.

165 *Id.* at 254 (quoting *Kellner I*, 307 A.3d at 1030).

166 *Id.* at 266.

167 *Id.*

168 *Kellner I*, 307 A.3d at 1030.

169 *Kellner II*, 320 A.3d at 267. Even though the court held that AIM's amended bylaws were unenforceable, the activists in *Kellner* did not really "win" the case. The court concluded its opinion by noting that "no further action [was] warranted" in the case. *Id.* At first, this might seem surprising given that the Court of Chancery had previously ruled that the incumbent board "acted reasonably and equitably in rejecting the Kellner Notice," *Kellner I*, 307 A.3d at 1044, and the incumbents were all reelected at AIM's subsequent annual meeting. AIM ImmunoTech Inc., Current Report (Form 8-K) (Jan. 5, 2024), https://www.sec.gov/Archives/edgar/data/0000946644/000149315224001918/form8-k.htm [perma.cc/CA9S-LKK8]. However, the Delaware Supreme Court's decision stemmed from the fact that the plaintiff had "submitted false and misleading responses to some of the [ANB] requests" and was working with a group that included two convicted felons. *Kellner II*, 320 A.3d at 245, 267.

or coercive to the stockholder franchise."[170] A board "must tailor its response to only what is necessary to counter the threat. The board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way."[171]

The Delaware Supreme Court in *Kellner* did not proceed to the second step of its equitable analysis, but in past cases, courts have generally been very willing to allow boards to adopt whatever provisions they like and enforce them to the letter, particularly those adopted on a clear day. This is especially true when the activist is "sophisticated."[172] However, several recent cases have begun to trace out the line of what provisions can reasonably be enforced. For instance, if a board were to adopt ANB amendments like the ones found to be unreasonable in *Kellner* on a clear day, a court may infer that the board's motives were proper, but it still seems unlikely that the court would allow the board to enforce the amended provisions to their logical extent in a real proxy fight. Additionally, the Court of Chancery in *Kellner* mentioned the previously discussed Masimo bylaws as having "gone to extremes."[173] Masimo's bylaws were challenged by activist hedge fund Politan Capital, but Masimo removed its controversial bylaws before the case could be decided.[174]

In *Kellner*, the Delaware Supreme Court did, however, opine on the remedies that are available for ANBs that "were adopted for a proper purpose" but contain "provisions [that] were disproportionate to the threat posed and preclusive."[175] In those cases, "the Court of Chancery has the discretion to impose an equitable remedy" and may "decide whether to enforce, in whole or in part, the bylaws that can be applied equitably."[176]

The choice of remedies here is significant. If courts generally enforce whatever parts of ANBs can be applied equitably, then there is little cost to boards of adopting onerous bylaws, even if they are later

---

170 Coster v. UIP Cos., 300 A.3d 656, 672–73 (Del. 2023).

171 *Id.* at 673.

172 *See* BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd., 224 A.3d 964, 980 (Del. 2020) (explaining how a defendant "should have understood" clear bylaws because it was "a sophisticated corporate entity").

173 *Kellner I*, 307 A.3d at 1023 & n.242. For an overview of the Masimo bylaws, see *supra* notes 118–23 and accompanying text.

174 *See* Alison Frankel, *How Activist Hedge Fund Politan Won $18 Million in Legal Fees Against Masimo*, Reuters (Nov. 27, 2023, 3:31 PM), https://www.reuters.com/legal/transactional/column-how-activist-hedge-fund-politan-won-18-million-legal-fees-against-masimo-2023-11-27 [https://perma.cc/L9L6-GQ8Y] (recounting the timeline of the Masimo-Politan litigation).

175 *Kellner II*, 320 A.3d at 261.

176 *Id.*

found to have breached their fiduciary duties. Relatedly, an activist who challenges a set of ANBs may win a battle by obtaining a ruling that the board acted inequitably but lose the war by having their nomination deemed invalid under a court-edited, narrower set of bylaws. I address these issues in more depth in Part V below.

As a final note about Delaware law, I mention briefly another set of ANB cases where the main question is how to *interpret* a contested provision, usually because the activist thinks it has complied but the board concludes otherwise.[177] In these cases, Delaware courts interpret bylaw provisions using principles from contract law,[178] and ANB ambiguities are resolved "in favor of the stockholder's electoral rights."[179]

III
Market-Wide Evolution

The complex ANBs that are commonplace nowadays are the product of decades of innovation in bylaw design. In this part, I use a new dataset comprised of the text of thousands of corporate bylaws to show how ANB practice has evolved over the past twenty years. ANB practice, it turns out, has been propelled by two large waves of innovation, with longer periods of gradual change in between.

A. Data

Data for this project came from five main sources. From the SEC's EDGAR database,[180] I obtained the full text of 14,770 sets of bylaws and 1,681 bylaw amendments. This corpus includes nearly all corporate bylaws and amendments filed with the SEC from 2004 through 2023 for a sample of 3,848 public companies.[181] I limited my sample to companies that (1) filed documents with the SEC during the sample period, (2) had shares trading for at least five years on a major U.S. stock exchange during the sample period (2004–23), (3) could be reliably linked to

177 *See, e.g.*, JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335 (Del. Ch. 2008); BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd., 224 A.3d 964 (Del. 2020); Paragon Techs., Inc. v. Cryan, No. 2023-1013, 2023 WL 8269200 (Del. Ch. Nov. 30, 2023).

178 *Kellner I*, 307 A.3d at 1037.

179 Hill Int'l, Inc. v. Opportunity Partners L.P., 119 A.3d 30, 38 (Del. 2015); *see also JANA Master Fund*, 954 A.2d at 345–46 (applying this principle).

180 EDGAR is the SEC's database of corporate filings. *See EDGAR*, Sec. & Exch. Comm'n, https://www.sec.gov/edgar/search [perma.cc/KJY2-C9LU].

181 I exclude from my sample publicly traded real estate investment trusts (REITs) and closed-end funds.

standard financial datasets,[182] and (4) had at least one set of filed bylaws from which I could extract the article containing the ANB provisions.

From this corpus of bylaws, I extracted the article within each document that contains the provisions related to stockholder's rights and annual meetings. For the vast majority of companies, this article contains the ANBs. I did so using a character-matching procedure that I describe in detail in the Appendix. I was able to extract the relevant article for 13,634 of the full bylaw filings, a success rate of 92.3%. For the amendments, only 1.8% appeared to contain a full copy of the article containing the ANB provisions. For the remainder of the amendment filings, I backfilled the article containing the ANBs by pulling in the relevant article from the filing firm's most recently filed (as of the amendment date) full set of bylaws.[183]

For companies that have adopted proxy access, the article containing the ANBs usually also includes the proxy access nomination provisions. Since ANBs and proxy access provisions can contain similarly worded disclosure requirements, I used another character-matching procedure to strip out the proxy access provisions for each extracted article. This process is also discussed in the Appendix.

Next, I created two variables to summarize the strength or complexity of each set of ANB disclosure provisions: *Strength* and *Word Count*. To create the *Strength* variable, I searched within each extracted article for thirteen different key terms and added up how many of the terms are found within the document.[184] *Strength* therefore ranges from zero (no terms were found) to thirteen (all terms were found) for each set of ANBs. The thirteen search terms were selected to identify the following thirteen ANB disclosure provisions: (1) AAUs, (2) Affiliates, (3) Associates, (4) Acting in Concert, (5) Competitors, (6) Derivatives, (7) Family, (8) Known Supporters, (9) Performance Fees, (10) Questionnaire, (11) Regulation S-K Item 404, (12) Schedule 13D, and (13) Interview. Note that *Strength* does not include ubiquitous disclosure requirements like the nominees' names and shares owned. It also does not capture extremely rare provisions (like those used by

[182] Specifically, I included companies I could link to the Center for Research in Security Prices (CRSP) and Compustat financial databases. I accessed both databases through the University of Pennsylvania's Wharton Research Data Services (WRDS). *See Wharton Research Data Services*, WHARTON, https://wrds-www.wharton.upenn.edu [perma.cc/9SZ5-FZ2Y].

[183] The SEC's rules allow companies to file amended text when they file Form 8-K to announce a bylaw amendment only if they file their complete bylaws along with their next 10-K or 10-Q. *See* 17 C.F.R. § 229.601(b)(3)(ii) (2024). Therefore, for most of the amendment filings, my dataset also contains a full text filing made a few months later.

[184] I used regular expression matching to search for the key terms. Each regular expression that I used is listed in the Appendix.

Masimo[185]) or daisy chain-creating defined terms. The second variable I constructed to measure ANB disclosure strength is *Word Count*. *Word Count* is simply the number of words in the Article containing the ANBs after removing numbers and proxy access provisions. Like *Strength*, this measure is designed to proxy for the level of substantive disclosures required by the ANBs.

I also created several additional variables to measure the length of firms' nomination deadlines and to capture whether the firms' ANBs referenced the UPC rules.

To validate my procedure for extracting and coding ANBs, I randomly selected a sample of 100 bylaws that I then coded by hand. I measured how well my machine-coding procedure aligned with my hand-coding for the sample bylaws. For each individual provision I track, and in each instance where the machine-coding procedure produced a non-missing response in the sample, there was over ninety percent agreement between my hand-coding and the machine-coding procedure. This validation exercise is discussed in greater detail in the Appendix.

I obtained financial data for firms in my sample from the Center for Research in Security Prices (CRSP) and Compustat databases. From CRSP, I obtained historical share prices, returns, and shares outstanding. From Compustat, I obtained accounting measures (such as income, assets, liabilities, paid dividends, etc.) as well as companies' state of incorporation and industry.

I obtained data on hedge fund activism events from three sources. Most of my data comes from Professor Alon Brav, a leading expert in hedge fund activism. Professor Brav was generous enough to share with me his comprehensive database of hedge fund activist events from 1994 through 2016. Professor Brav's dataset contains two types of events: Schedule 13D filings (which announce when an activist has accumulated at least a five percent stake in the target company) and proxy fight announcements (only for activist campaigns without a 13D filing). I supplemented Professor Brav's data by adding in additional events from 2017 through 2023. Information on these additional events came from the FactSet database and from Schedule 13Ds filed with the SEC.[186] I selected the additional activism events using a screening process designed to match the process used to create the Brav dataset. In the Appendix, I discuss my screening process in detail. In total, my dataset includes 2,590 campaigns at 1,528 unique target firms (or about forty percent of the firms in my sample).

---

185 *See supra* notes 118–23 and accompanying text.

186 I accessed FactSet through the WRDS online database. *See supra* note 182. I collected Schedule 13D filings from the SEC's EDGAR database. *See supra* note 180.

One important feature of my dataset is that it covers a wide range of firms instead of being limited to large prominent firms or firms incorporated in Delaware. As an illustration, Table 1 shows the number of firms represented in my dataset that are incorporated in each of the ten most common states of incorporation.[187] Predictably, Delaware claims the largest share (by far) with just over sixty percent of firms. This share is consistent with other sources, which have reported that about two-thirds of Fortune 500 companies are incorporated in Delaware.[188] Importantly, non-Delaware firms make up forty percent of the firms in my dataset. Three and a half percent of firms are headquartered in Nevada, and more than two percent are headquartered in each of Pennsylvania, California, New York, and Maryland. The rest of the firms are scattered throughout the rest of the country.

TABLE 1. NUMBER OF FIRMS BY STATE

States	Number of Firms (%)
DE	2,333 (60.6)
NV	133 (3.5)
PA	89 (2.3)
CA	87 (2.3)
NY	81 (2.1)
MD	78 (2.0)
FL	68 (1.8)
VA	61 (1.6)
MN	58 (1.5)
TX	58 (1.5)
Other	537 (14.0)
Missing	265 (6.9)
Total	**3,848 (100)**

As an additional illustration, I note that my sample contains many of the largest U.S. firms—including Apple, Microsoft, Tesla, and Exxon, which had stock market capitalizations in the hundreds of billions or trillions of dollars at the end of 2023—as well as many small-cap firms like Novabay Pharmaceuticals and Kintara Therapeutics, both of which had market caps of less than two million dollars at the end of 2023.

187 The table uses data for firms in my sample pulled from the SEC's header files on June 6, 2024.

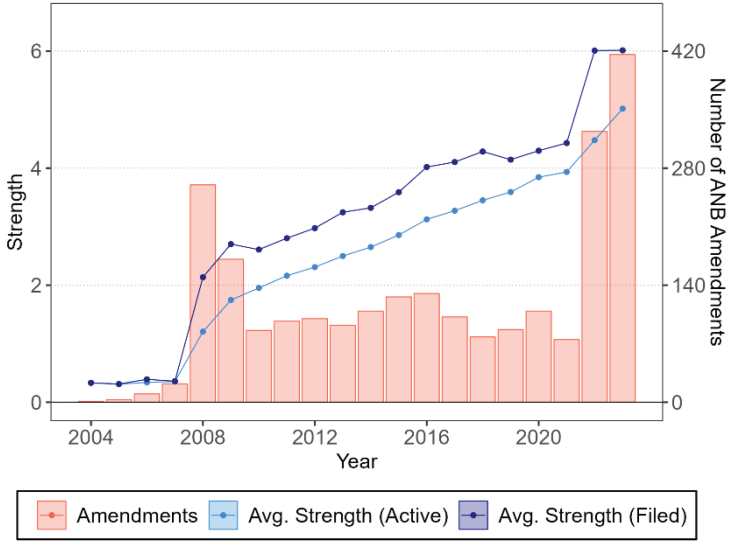
188 *See, e.g.*, *2020 Annual Report Statistics*, DEL. DIV. OF CORPS. (2020), https://corp.delaware.gov/stats/2020-annual-report [perma.cc/K4TD-2ELC] (reporting that "nearly 68%" of Fortune 500 companies are domiciled in Delaware); Chauncey Crail, Rob Watts & Jane Haskins, *Why Incorporate in Delaware? Benefits & Considerations*, FORBES: ADVISOR (Feb. 15, 2024), https://www.forbes.com/advisor/business/incorporating-in-delaware [https://perma.cc/FRY8-DS5S] ("68% of Fortune 500 companies . . . [are] registered in Delaware . . . .").

B. *Two Waves of Disclosure Amendments*

Next, I use a series of figures to tell the economy-wide story of how ANB disclosure provisions have developed over the past twenty years. The figures plot changes in the set of variables that I use to summarize information from the ANBs' text.

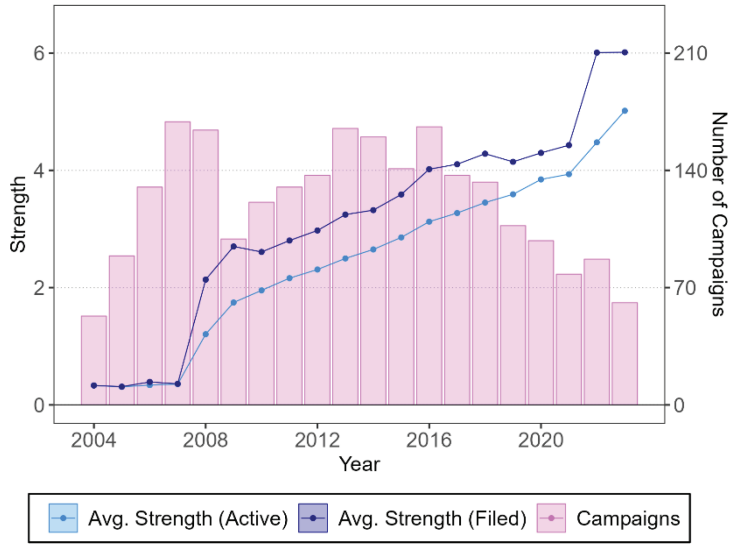
Figure 1 plots the value of the *Strength* variable over time in two separate panels. Panels (a) and (b) both plot the average *Strength* of ANBs filed with the SEC and the average *Strength* of all active ANBs in each calendar year.[189] Panel (c) plots the average *Word Count* of active and filed ANBs. In addition to the *Strength* variable, Panel (a) also plots the number of ANB amendments in each year. I counted a bylaw filing as an ANB amendment if it met two conditions: (1) the bylaw added or deleted any of the *Strength* components or a UPC reference and (2) the bylaw's *Word Count* increased or decreased. (I measured changes relative to the filing firm's most recent, previous bylaw filing.) Panel (a) reveals that enhanced disclosure provisions were essentially absent from ANBs filed prior to 2008. Afterward, enhanced disclosure requirements evolved in three distinct phases: an initial wave of adoptions in 2008–09, a gradual strengthening from 2010 to 2021, and a second wave of amendments in 2022–23.

FIGURE 1. ANB STRENGTH OVER TIME

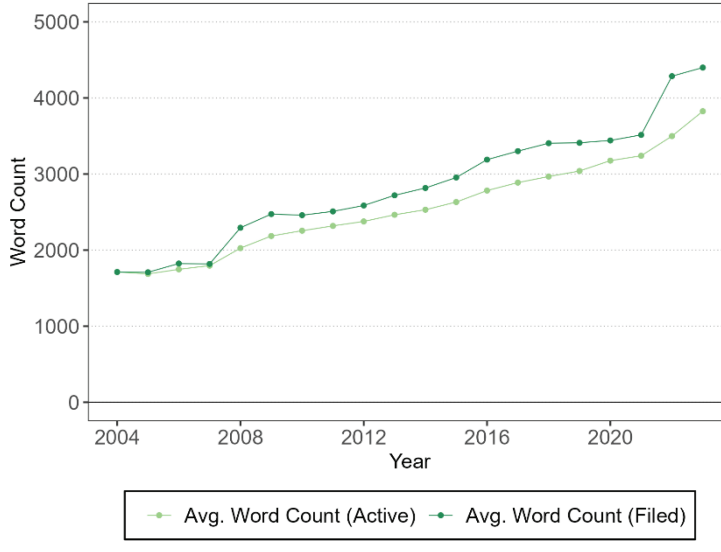


(a) Average *Strength* versus Number of ANB Amendments

189 The "active" ANBs in a given year are the most recently filed ANBs for each firm that was publicly traded at the end of the year.



(b) Average *Strength* versus Activism Campaigns



(c) Word Count

What drove the two waves of ANB disclosure amendments? Panel (b) plots the *Strength* variable next to the annual number of activist events in the expanded Brav dataset targeting firms for which I was able to extract ANBs. As Panel (b) shows, the first wave of ANB amendments followed a marked increase in campaigns by hedge fund activists against the firms in my sample. It also coincided with the

Great Financial Crisis, when many firms may have felt extra vulnerable to activism due to their low stock market valuations. These changing market conditions likely prompted creative lawyers to innovate. In an April 2009 memo, law firm Latham & Watkins reported that "[a]bout a year ago, law firms began recommending that their clients insert requirements in their advance notice bylaws" regarding "decoupled equity and voting interests" (e.g., related to synthetic equity created from derivatives).[190] The memo refers to these new bylaws as "second generation advance notice bylaws."[191]

In contrast to the first wave, which seems to have been driven by market conditions, the second wave of amendments has been linked to a recent regulatory change. The SEC adopted rules in late 2021 requiring companies to use a Universal Proxy Card (UPC) in contested elections held after August 31, 2022.[192] As discussed previously, the new UPC rules were expected to make proxy contests less expensive,[193] and some practitioners predicted that they would unleash a tidal wave of activist campaigns.[194] Against this backdrop, it is unsurprising that many firms chose to review and update their election-relevant bylaws in the wake of the rule change. Several recent law firm memos corroborate this explanation.[195] These memos report that following the introduction of the Universal Proxy Card, many firms have amended their ANBs to account for the new rules.[196] These firms also appear to have added new substantive disclosure requirements.[197] Panel (b) shows that the average *Strength* of all active ANBs increased at a faster rate during 2022 and 2023 than it did over the previous decade.

---

190 Charles Nathan & Stephen Amdur, *Second Generation Advance Notice Bylaws and Poison Pills*, Harv. L. Sch. F. on Corp. Governance (Apr. 22, 2009), https://corpgov.law.harvard.edu/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills [perma.cc/3WU3-ZE8P].

191 *Id.*

192 Liekefett et al., *supra* note 21.

193 *See* Lipton et al., *supra* note 55.

194 *See* Berenblat et al., *supra* note 57 ("In many cases, company counsel have purported to justify such overreaching amendments by suggesting that the universal proxy regime renders companies highly vulnerable to a new wave of shareholder-led proxy contests and that an overhaul of advance notice requirements is needed to protect boards against frivolous shareholder nominations.").

195 *See, e.g.*, Schnell & Iqbal, *supra* note 115; Thomas W. Christopher, Maia Gez, Danielle Herrick & Jennifer Chu, *Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation*, White & Case (June 8, 2023), https://www.whitecase.com/insight-alert/amending-bylaws-and-charters-address-universal-proxy-shareholder-activism-and-officer [https://perma.cc/6BGV-N4XN]; *see also supra* note 50.

196 *See* Schnell & Iqbal, *supra* note 115; Christopher et al., *supra* note 195.

197 *See* Schnell & Iqbal, *supra* note 115, at 108 (reporting that fifty-four percent of firms amending their ANBs in response to UPC changes also imposed new substantive disclosure requirements); *see also* Christopher et al., *supra* note 195.

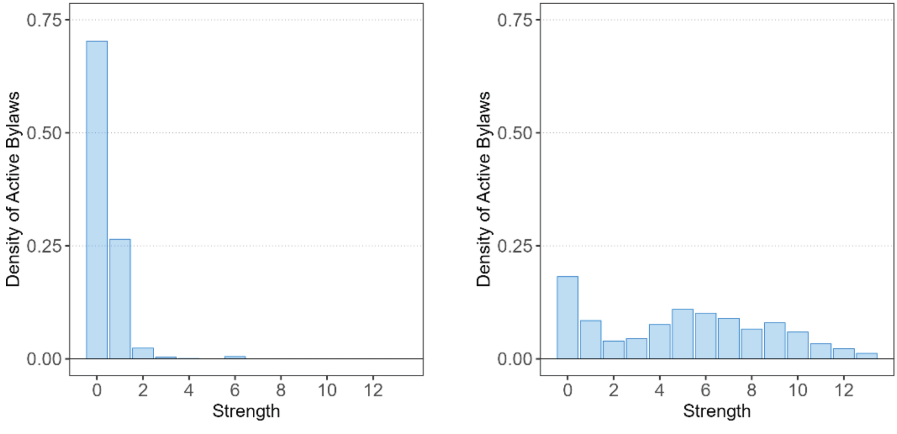
C. *Divergence in Individual Disclosure Provisions*

One of the limitations of summary measures like the average of *Strength* and *Word Count* is that they do not provide information about the variability in disclosure provisions across firms. It is not clear from Figure 1, above, whether companies have strengthened their ANBs in lockstep by adopting each year the latest set of "market" provisions, or whether companies have instead taken very different paths in updating their ANBs.

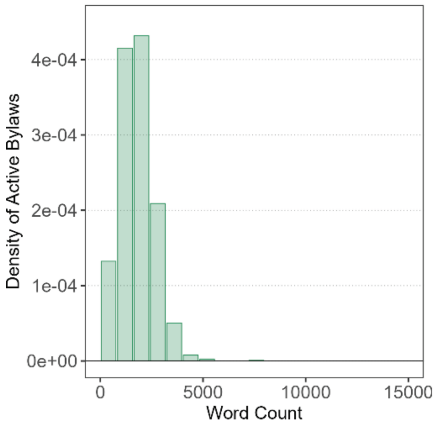
To shed some light on whether there is a "market" set of disclosure provisions and, if so, what provisions are in this standard set, I next explore changes over time in the variability of *Strength* and *Word Count* as well as the evolution of individual disclosure provisions. The upshot of this exploration is that drafting practice has, in general, not converged but is rather still evolving. However, there is some limited evidence that the pace of change may be slowing.

Figure 2 plots the distributions of *Strength* and *Word Count* for all active ANBs in two years: 2007, which was before the global financial crisis ("GFC") and the first wave of amendments, and 2023, which is the most recent year in my dataset. These plots show that, before the first wave of amendments, there was very little variation in ANB drafting. However, in recent years, the levels of variation in ANB *Strength* and *Word Count* have increased dramatically, and firms have not clumped together at any particular level of ANB stringency.

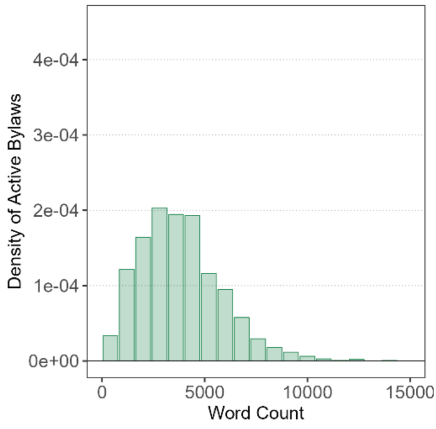
FIGURE 2. DISTRIBUTION OF ANB *STRENGTH* AND *WORD COUNT*



(a) *Strength*, 2007 (Pre-GFC) (b) *Strength*, 2023



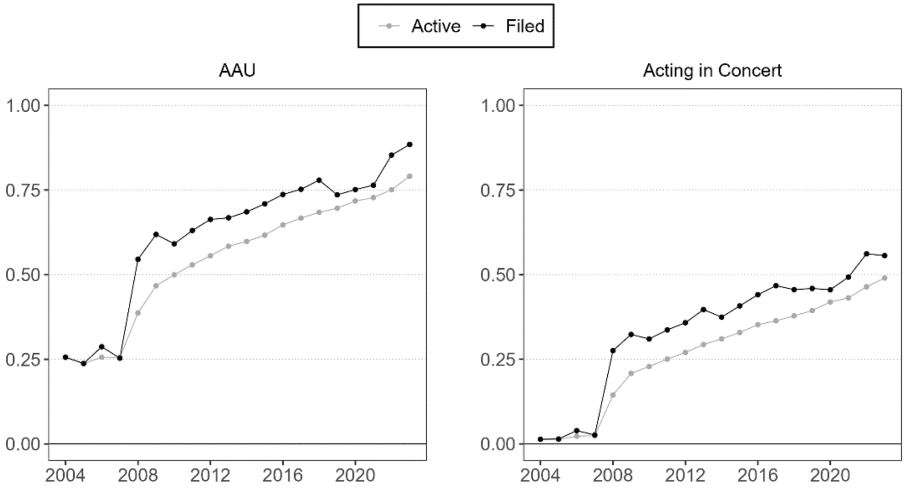
(c) *Word Count*, 2007 (Pre-GFC)

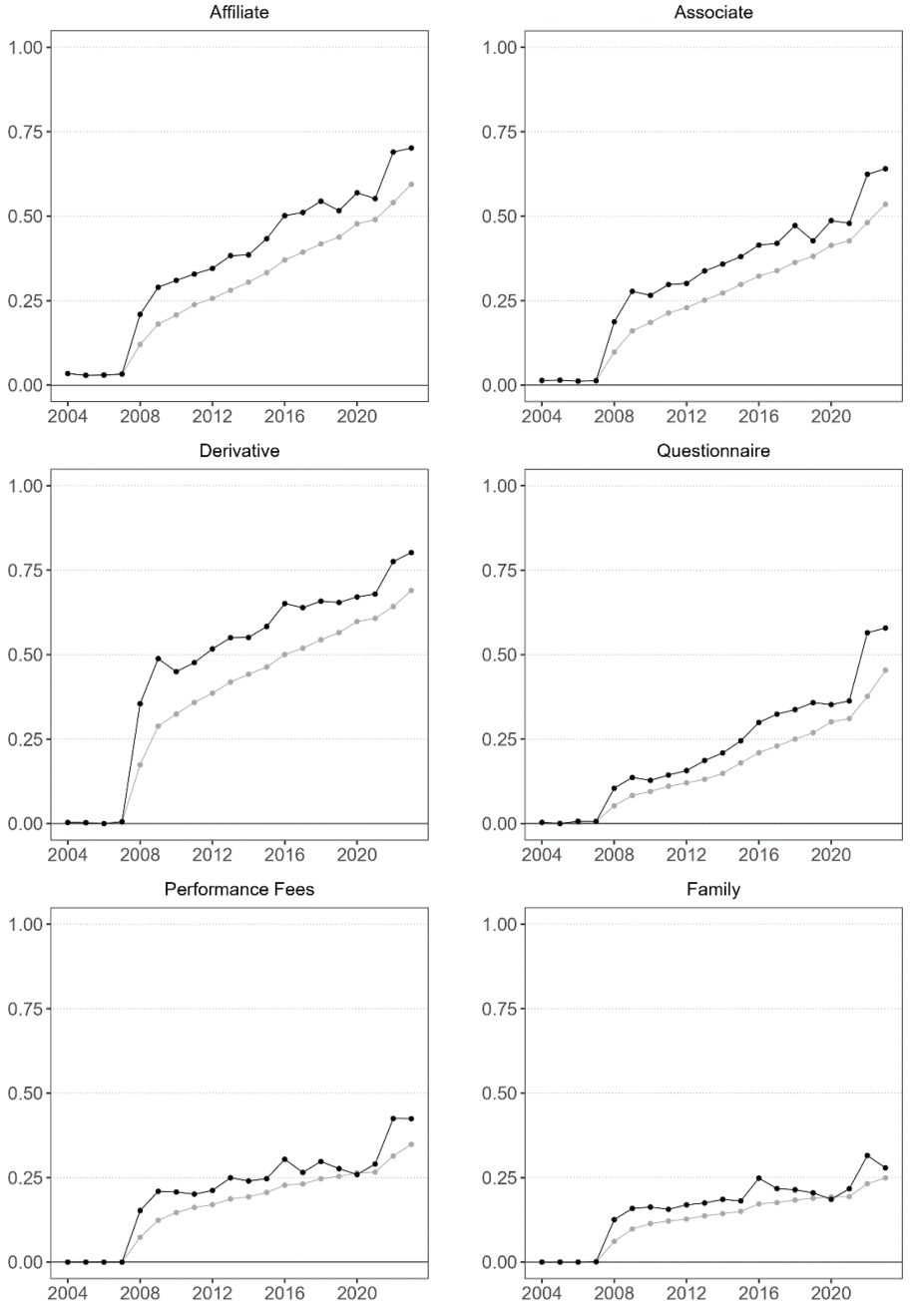


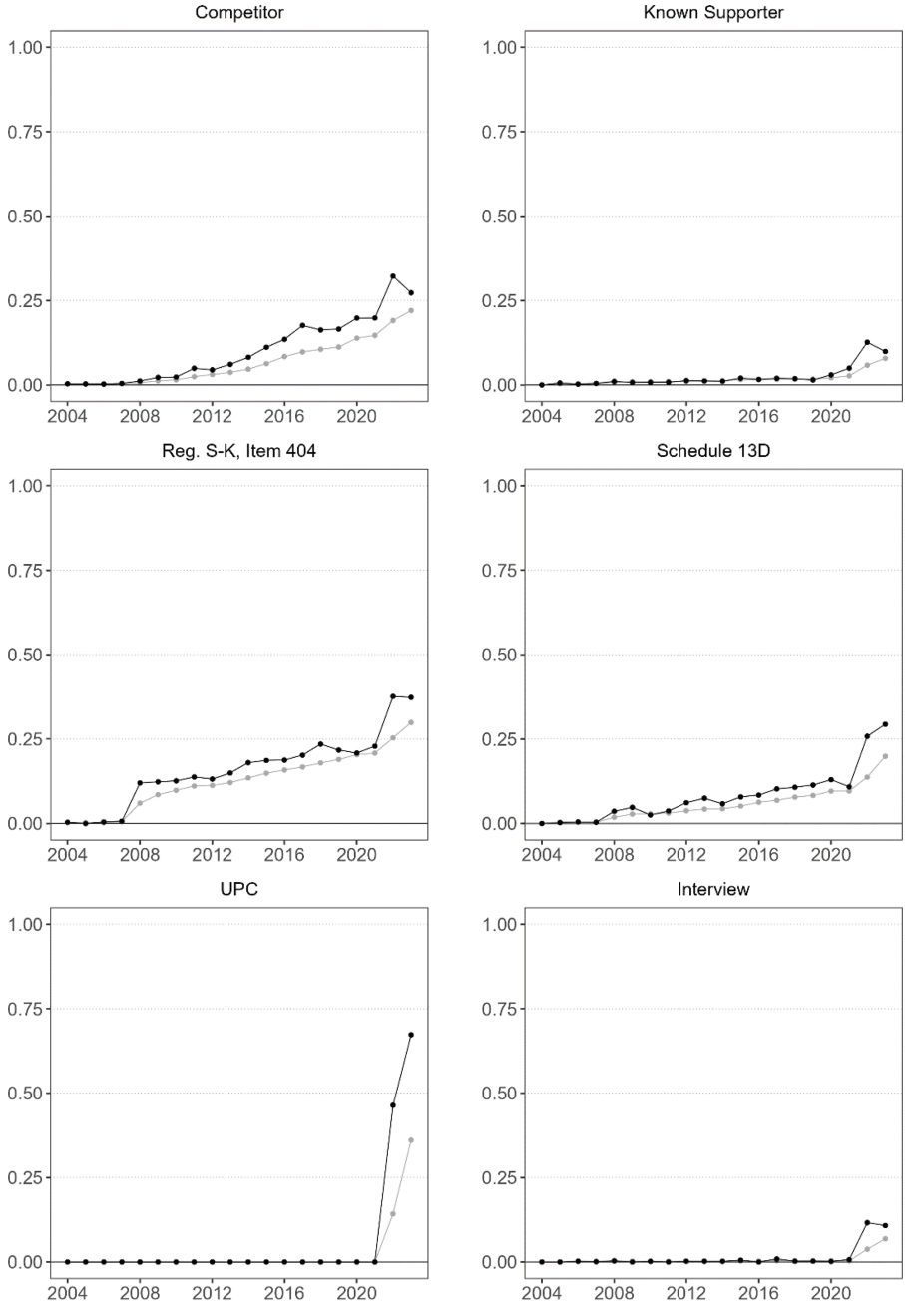
(d) *Word Count*, 2023

Figure 3 breaks out each of the individual components of *Strength* and plots their evolution over time. It plots the percentage of all filed ANBs (black line) and all active ANBs (gray line) that contain each key term at the end of each calendar year. It also plots these adoption percentages for three other provisions. Two of these provisions ("Proxy Anchor" and "Anniversary") are connected to firms' nomination windows and are discussed in the next section. The third captures whether the firm's ANBs include a reference to the SEC's UPC rules ("UPC").

FIGURE 3. TRACKING ANB PROVISIONS OVER TIME




Affiliate
Associate
Derivative
Questionnaire
Performance Fees
Family
1.00
0.75
0.50
0.25
0.00
2004
2008
2012
2016
2020


Competitor
Known Supporter
Reg. S-K, Item 404
Schedule 13D
UPC
Interview
1.00
0.75
0.50
0.25
0.00
2004
2008
2012
2016
2020

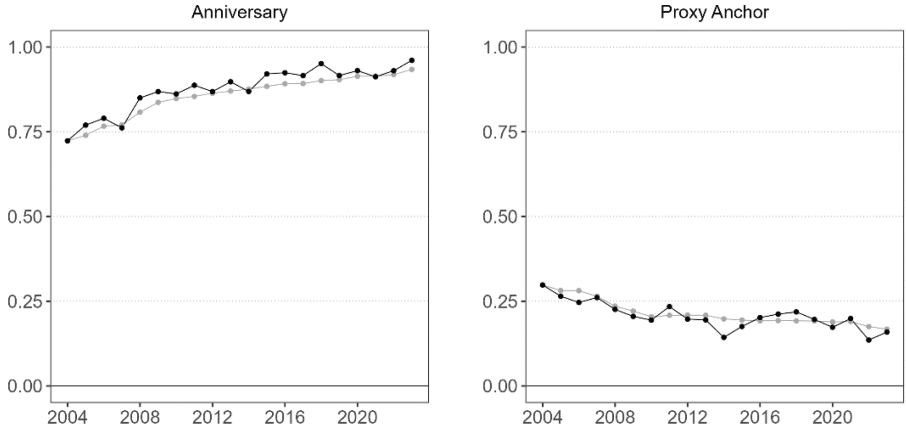


Figure 3 shows that the disclosure provisions I track can be divided into three categories: majority provisions, fifty-fifty provisions, and minority provisions. The AAU and Derivative provisions are the only two enhanced disclosure provisions that I would consider majority provisions. Both provisions show up in around seventy-five percent of all active ANBs. They are also notable because they are the only provisions that showed up in half or more of the ANBs filed during the first adoption wave. The AAU provision is also unique in that it had a substantial adoption level prior to 2008.

On the flip side, the Competitors, Family, Known Supporters, Performance Fees, Regulation S-K Item 404, Schedule 13D, and Interview provisions are all minority variations. These seven provisions all have adoption levels well below fifty percent, but their trajectories vary significantly. For example, the Performance Fees and Schedule 13D provisions seem to be gaining traction in recent years, but the progress of the Family and Known Supporter provisions seems to have stalled out and possibly reversed in 2023. Interview requirements appear to have been invented only in 2022, and it is unclear whether they will catch on.

Finally, the four remaining provisions in Figure 3 (Affiliates, Associates, Questionnaires, and Acting in Concert) all have right around fifty percent adoption. The first two (Affiliates and Associates), however, may be on a path toward majority adoption since they showed up in nearly seventy-five percent of bylaws filed during the 2022–23 wave. The Questionnaire provision is also interesting because it was a clear minority provision until the 2022–23 amendment wave, when it suddenly jumped up toward fifty percent adoption.

The evidence from combining all of the charts in Figure 3 is significant because it shows that disclosure practice has not converged

on a set of "market" provisions. As of the end of 2023, most of the provisions I track have been adopted by somewhere between twenty-five and seventy-five percent of active firms in my sample, and few, if any, seem clearly headed for universal adoption or extinction.

It is worth noting, however, that some evidence in Figure 3 suggests that the pace of change may be slowing down, at least for some of the less common provisions. Figure 3 shows that, while most disclosure provisions have become more common in filed bylaws over time, three of the least common provisions (Family, Competitor, and Known Supporter) were less common in bylaws filed in 2023 than they were in bylaws filed the previous year. This signal could indicate that we've reached the peak of ANB innovation and that bylaws will start converging to a standard over the next few years. On the other hand, they may just reflect the fact that firms amending their ANBs in the back half of the UPC wave were more risk-averse than their peers who amended in the first half. It is therefore too early to tell at this point whether 2023 was a blip or the beginning of a trend.

D. Deadline Convergence

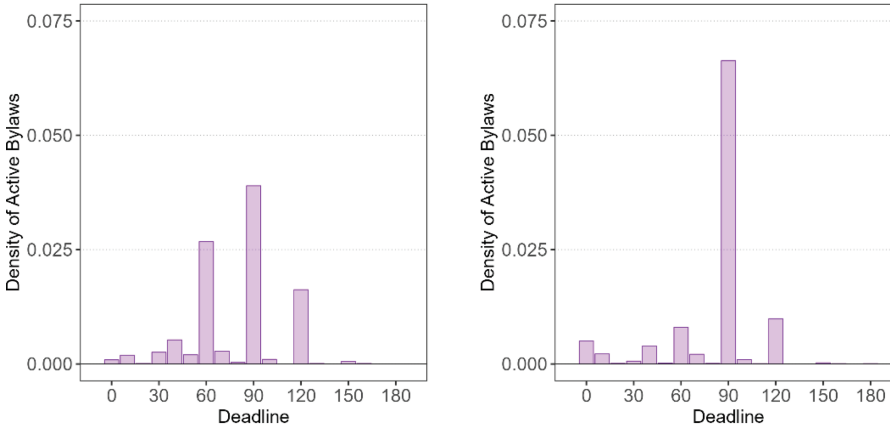
This Section presents data on the evolution of ANB's nomination deadlines. These data present a sharp contrast to the data on individual disclosure provisions, which show little evidence of convergence toward a market standard. The data on deadlines, on the other hand, show drafting practice moving quickly toward a single standard nomination deadline set at ninety days before the anniversary of the previous year's annual meeting.[198]

The last two plots in Figure 3 track the percentage of filed and active bylaws where (1) the firm's nomination deadline is set relative to its proxy filing date (as opposed to its annual meeting date) ("Proxy Anchor") and (2) the firm's deadline is set relative to the anniversary of its previous meeting or proxy filing (as opposed to the actual date of the upcoming meeting or filing) ("Anniversary"). Both of these plots show a clear trend toward convergence. The Proxy Anchor variation, which initially had a low adoption level, has consistently decreased in prevalence since 2004 and seems headed for extinction. The Anniversary variation, on the other hand, has seen its adoption level increase steadily since 2004 and is now nearing universal adoption.

[198] Note that the data in this Section come only from firms where my machine-coding procedure produced a non-missing response for the nomination window variables. As I discuss more fully in the Appendix, some firms in my data did not have ANBs at all, and there were other firms for whom I was unable to extract the nomination window.

Figure 4 contains two plots that show how the length of the nomination deadline (in days before the anchor date) has changed over time. Together, these plots show that deadline lengths have, by and large, converged to ninety days before the anchor date.

FIGURE 4. AVERAGE ANB DEADLINE (DAYS BEFORE THE ANCHOR DATE)



(a) Deadline, 2007 (Pre-GFC) (b) Deadline, 2023

Panel (a) shows the distribution of deadlines for active bylaws in 2007 and Panel (b) shows the distribution of deadlines in 2023. In both of these years, ninety days was the most common deadline length. In 2007, sixty-day and 120-day deadlines were also quite common, but by 2023, these deadlines had become much less common, and ninety-day deadlines were clearly the dominant choice.

Overall, the evidence from the Figure 3 anchor date plots and the Figure 4 deadline distributions show that ANB nomination windows have converged to a single, clear market standard. This contrasts sharply with the drafting of disclosure requirements, which has yet to converge.

Finally, it is also interesting to note that, for all of their influence on corporate governance standards, proxy advisory firms ISS and Glass Lewis seem to have had little impact on the standard to which ANB deadlines have converged. For the past several years, Glass Lewis's policy has generally recommended voting against proposals "that would require advance notice of shareholder proposals or of director nominees" regardless of their deadline.[199] This policy seems to have been

[199] 2024 GLASS LEWIS GUIDELINES, *supra* note 24, at 78; *see also* GLASS LEWIS, 2020 PROXY PAPER GUIDELINES 48 (2020) [hereinafter 2020 GLASS LEWIS GUIDELINES], https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf [https://perma.cc/48NL-68PJ] (using identical language).

irrelevant given that nearly every company uses ANBs and ANBs are adopted by boards without a shareholder vote in every case of which I am aware. ISS's policy is perhaps more tolerant of ANBs but seems to have been similarly irrelevant. The maximum deadline that ISS said it considered reasonable from 2013 to 2020 was only sixty days before the annual meeting.[200] During that time, most companies' deadlines were longer than sixty days and were converging to ninety days as the standard. ISS did not move its maximum reasonable deadline to 120 days before the previous meeting's anniversary until the 2021 proxy season.[201] Nonetheless, it is possible that the very fact that ISS and Glass Lewis mention nomination deadlines in their voting guidelines has encouraged companies and their lawyers to move toward a standard. Because ISS and Glass Lewis have said nothing about disclosure requirements, practitioners may feel less pressure to adhere to a market standard.

IV
Firm-Level Factors

In contrast to the previous Part, which provided evidence about market-wide ANB developments, this Part zooms in to the firm level and explores factors that may be driving ANB changes at individual firms. I focus here on ANB disclosure requirements because the data presented previously show substantial variability across firms in the requirements they adopt. In contrast, there is low and decreasing variability in nomination windows, making them a less interesting subject for studying firm-level variation.

First, I show that ANB strength has, over the past twenty years, been highly correlated with firm size: Large firms have consistently had longer and more complex disclosure provisions than smaller ones. This finding is somewhat surprising, because previous research has shown that smaller firms tend to be more likely to be targeted by hedge fund activists than larger ones.[202] Additionally, for readers inclined to view long and complex ANBs as an example of "bad" (or shareholder-unfriendly)

---

[200] *See* Institutional S'holder Servs., Inc., 2013 U.S. Proxy Voting Summary Guidelines 23 (2013) [hereinafter 2013 ISS Guidelines], https://www.issgovernance.com/file/2013-policies/2013ISSUSSummaryGuidelines1312013.pdf [https://perma.cc/34BP-94VS]; Institutional S'holder Servs., Inc., United States Proxy Voting Guidelines 23 (2019), https://www.issgovernance.com/file/policy/2020/americas/US-Voting-Guidelines.pdf [https://perma.cc/4XHS-79C6].

[201] *See* Institutional S'holder Servs., Inc., United States Proxy Voting Guidelines 24 (2020), https://www.issgovernance.com/file/policy/2021/americas/US-Voting-Guidelines.pdf [https://perma.cc/3PW7-Z2FT].

[202] *See* Brav et al., *supra* note 28, at 31 ("[H]edge funds tend to target low- and mid-cap (MV) firms . . . .").

governance, this finding sits in tension with prior legal research, which has tended to conclude that large companies "serve as role models of 'good' governance practices."[203]

Second, I show that ANB strength is connected to firms' exposure to hedge fund activism.[204] I provide evidence suggesting that some firms directly respond to the appearance of an activist by increasing the level of disclosure required in their ANBs relative to their peers. This effect is driven entirely by firms who have relatively weak disclosure requirements before being targeted. These findings tend to corroborate the theory that boards view ANB disclosure requirements as defensive tools for managing activist engagements. However, they are also consistent with heightened legal scrutiny dissuading firms from pushing the boundaries of practice in their "rainy day" amendments.

A. ANB Disclosure Requirements and Firm Size

To understand the firm-level factors that affect ANB development, I begin by exploring the relationship between a firm's size and the strength of its disclosure requirements. Firm size is an important place to start, because prior law and finance research has shown that (1) small firms are more likely to be targeted by activist hedge funds than large firms,[205] and (2) there is often a substantial gap between the governance arrangements (including charter and bylaw provisions) adopted by large and small firms.[206]

Both of these prior findings seem to suggest that smaller firms would have tougher ANB disclosure requirements than larger firms. Because small firms are more likely to be targeted, it benefits the boards of small firms more to have defenses in place. Additionally, according to Professors Kobi Kastiel and Yaron Nili, large firms are much more likely than small ones to adopt shareholder-friendly governance arrangements.[207] For example, as of 2020, large firms were less likely to have staggered boards and supermajority requirements

---

203 Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 786–87 (2022).

204 *Cf.* Anita Anand & Michele Dathan, *An Empirical Analysis of Advance Notice Provisions in Corporate Bylaws: Evidence from Canada*, 49 INT'L REV. L. & ECON. 41, 41 (2017) (finding support for the hypothesis that firms "are more likely to propose an ANP [advance notice provision]" when they are "more vulnerable" to a proxy contest).

205 *See* Brav et al., *supra* note 28, at 32 ("[A] one-standard deviation increase in (log) market value is associated with a 1.51 percentage point decrease in the probability of [activist] targeting . . . .").

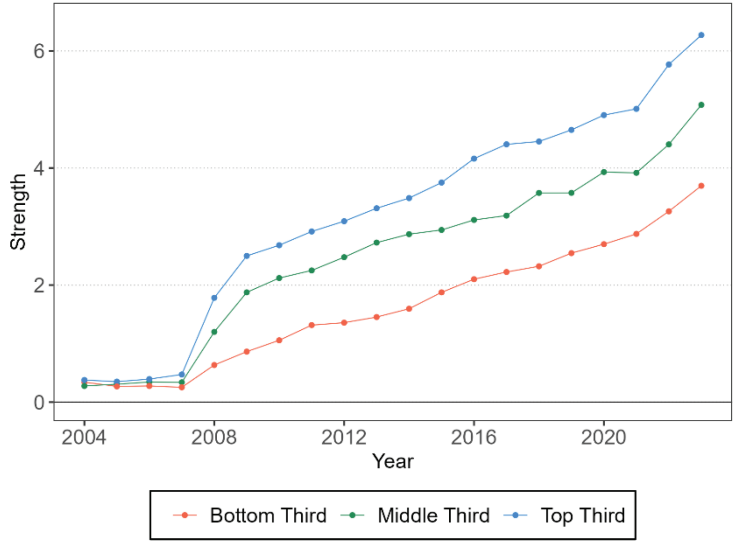
206 *See* Kastiel & Nili, *supra* note 203, at 782 ("While many large, high-profile companies tend to serve as role models of desirable governance practices, the picture of corporate governance . . . is considerably different . . . within the universe of small cap corporations.").

207 *See id.* at 824.

for charter amendments and more likely to implement proxy access, give shareholders the right to call special meetings, and use a majority voting standard in director elections.[208] These arrangements all tend to give shareholders more power vis-à-vis the board and are favored by large institutional investors.[209] Since ANBs—with enhanced disclosure requirements in particular—burden shareholders' ability to nominate their preferred director candidates, it would seem consistent with the pattern identified by Professors Kastiel and Nili for small companies to have tougher ANBs.

The data, however, show that the opposite is true. Figure 5 plots the average *Strength* of active ANBs for firms separated into three groups by size in each year.[210] The Figure shows that the largest third of firms have had more ANB disclosure provisions than the middle third and the smallest third in every year since second generation ANBs were invented. The smallest third of firms have also had fewer disclosure provisions than the two other groups over the same period. The gap between large and small firms arose immediately after second generation ANBs were invented and has been stable over time. If anything, it has widened in recent years.

FIGURE 5. AVERAGE ANB STRENGTH (ACTIVE) BY SIZE TERCILE OVER TIME



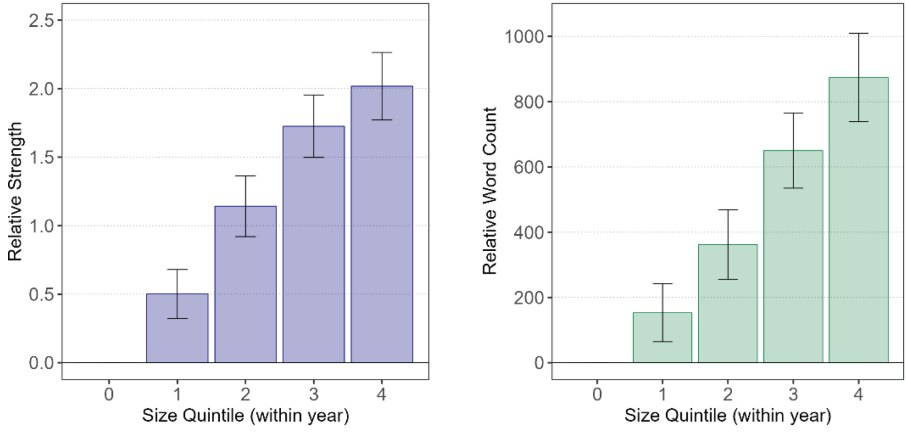
208 *See id.* at 824–33.

209 *See id.*

210 I measure a firm's size using its stock market capitalization, calculated as the firm's price per share times the number of outstanding shares at the end of each calendar year using data from CRSP. *See* Appendix. I assign companies to terciles independently for each year (i.e. the firm composition of each tercile is not fixed over time).

To confirm that these within-year gaps in ANB disclosure strength between firms of different sizes are statistically significant, I use a regression analysis to estimate the difference in ANB *Strength* and *Word Count* between larger and smaller firms within each year. For this analysis, I separate the firms into five size-based groups in each year instead of three.[211] Figure 6 plots the results of this analysis. It shows that on average, after controlling for differences across years, the largest twenty percent of firms in a given year have two more of the disclosure provisions that I track than the smallest twenty percent of firms, and the bylaw articles containing their ANBs are nearly 900 words longer. These results are statistically significant. Additionally, the differences in strength are quite consistent between adjacent groups. If you move from any size group to the next largest group, *Strength* increases by around 0.5 and *Word Count* increases by around 200 words.

FIGURE 6. ANB DISCLOSURE REQUIREMENTS BY SIZE QUINTILE (WITHIN YEAR)



(a) Strength (b) Word Count

211 I estimate the following regression specification:

$$Y_{ijt} = \sum_{j=1}^{4} \beta_j \cdot quintile_{jt} + \mu_t + \epsilon_{ijt}$$

Y is the dependent variable for firm *i* in market cap quintile *j* in year *t*. The *quintile* variables are indicator variables that are equal to 1 for firms in quintile *j* in year *t* and 0 otherwise. For example, $quintile_{jt}$ for $j = 4$ is equal to 1 if firm *i* is one of the largest 20% of firms by market cap in year *t*. The $quintile_{jt}$ for $j = 0$ represents the smallest 20% of firms in each year and is not included in the regression to prevent multicollinearity. The coefficients on all of the other *quintile* variables capture the ANB *Strength* (or *Word Count*) of those size groups relative to the bottom group. Finally, μ_t captures year fixed effects, and ϵ_{it} is an error term. Standard errors are clustered at the firm level, and the error bars depict 95% confidence intervals around each estimate.

What could be driving these results, given that they seem to be in tension with prior research? I offer five possible explanations:

(1) **Ability to Pay**. Even though small firms might benefit more from having tough defenses, they have less money to spend on corporate defense lawyers, so their bylaws may be amended less frequently and less creatively. Large firms might also be more willing to push legal boundaries by adopting tough ANBs because they have more resources to defend against lawsuits by activists. Small firms, on the other hand, might be more conservative with their amendments to reduce litigation risk.

(2) **Lawyer Marketing**. ANB amendments might be a way for top lawyers to present themselves as aggressive and creative to their large (and high-paying) clients.

(3) **Investor Pressure**. It may be the case that large firms only adopt pro-shareholder arrangements when they are pressured to by their investors. Since institutional investors have largely ignored ANBs for most of their existence, large firms may have felt completely free to adopt whatever ANB provisions they wanted.

(4) **Other Defenses**. Staggered boards are much more common among small companies.[212] Since staggered boards sharply limit the total number of seats activists can win in a proxy fight, companies with staggered boards may feel less of a need to adopt other defensive measures.

(5) **Investor Pressure (Version 2)**. A final possibility is that shareholders prefer strong ANBs (perhaps because they are effective tools for filtering out problematic activists and cutting down on meritless election contests) and large firms are more likely to incorporate their shareholders' preferences into their governance arrangements.

At this point, because institutional investors and proxy advisors have said very little about their preferences for or against enhanced ANB disclosure requirements, it seems unlikely that shareholder preferences for strong ANBs are driving the divergence between large and small firms. Further, Kastiel and Nili's research points out that large firms have generally adopted pro-shareholder arrangements over the past several decades as the result of pressure from institutional investors and shareholder rights advocates and not of their own

[212] *See* Guernsey et al., *supra* note 46, at 2–3 & n.3 (reporting that, in 2020, a smaller percentage of firms in the S&P 500 (12%) and S&P 1500 (31%) indexes had staggered boards than did publicly traded firms outside these indexes (52%)).

volition.[213] This suggests that some combination of the first four explanations is at play.

B. ANB Disclosure Requirements and Activism

Next, I explore whether firm-level activism drives targeted firms to amend their ANBs. If firms see tough ANBs as a way to ward off activists or gain leverage in settlement negotiations, then boards may respond to targeting by adding disclosure requirements to their ANBs. On the other hand, because Delaware law carefully scrutinizes "rainy day" bylaw amendments,[214] boards may avoid adding disclosure requirements after they are targeted in order to avoid being sued for breaching their fiduciary duties.

To test whether being targeted spurs firms to add disclosure provisions to their ANBs, I use an event study specification used in the finance literature to study the effects of hedge fund activism. The specification compares changes in ANB disclosure strength for targeted firms in the years before and after they are targeted to changes in ANB strength for nontargeted firms over the same time period.[215] Throughout my analysis, I study changes in ANB disclosure strength in a window around each activism event that includes the three years before and the five years after the event year. This window has been used in several previous studies on the effects of hedge fund activism.[216]

The main limitation of the event study methodology in the activism context is that hedge funds do not target firms randomly, so targeted firms are systematically different from nontargeted firms. The event study methodology relies on a "parallel trends" assumption, which, in this setting, is that the ANB strength of targeted and nontargeted firms would move in parallel in the absence of hedge fund activism. However, if the differences between targeted and

---

213 *See* Kastiel & Nili, *supra* note 203, at 799–814 (explaining that corporate governance is "not self-driven" but is in many cases driven by shareholders).

214 *See supra* notes 151–89 and accompanying text.

215 I use an event study version of the stacked difference-in-differences set up from Todd A. Gormley & David A. Matsa, *Growing Out of Trouble? Corporate Responses to Liability Risk*, 24 Rev. Fin. Stud. 2781, 2788–93 (2011). See Guernsey et al., *supra* note 46, at 29–30 for a recent use of the stacked event study methodology in the corporate governance context. The stacked event study design is also discussed in Andrew C. Baker, David F. Larcker & Charles C.Y. Wang, *How Much Should We Trust Staggered Difference-in-Differences Estimates?*, 144 J. Fin. Econ. 370 (2022).

216 *See, e.g.*, Brav et al., *supra* note 28, at 47; Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?*, 130 J. Fin. Econ. 237, 246 (2018); *see also* Baker, *supra* note 69, at 19 (using a similar window with five years before and five years after each activism event).

nontargeted firms are related to factors that might affect the path of their ANB development (e.g., firm size, firm performance, and board risk preferences), then I might over- or underestimate the true impact of activism on ANB strength.

To reduce this selection bias, I use propensity score matching to identify nontargeted firms that are similar to the targeted firms. This matching procedure involves estimating within each year the probability that each firm will be targeted by an activist based on a set of accounting variables including firm size, leverage, performance, research and development spending, and dividends. (These probabilities are referred to as "propensity scores.")[217] Then, I match each targeted firm to up to five nontargeted firms that operate in the same industry as the targeted firm. For firms with more than five possible matches, I select the matches that have the closest propensity scores to the target firm.[218] I also ensure that matched firms were not targeted in any of the years within the event window.

To provide some assurance that my matching procedure produces a set of control firms comparable to the target firms (at least on observable characteristics), I conduct a series of statistical tests to evaluate whether the target firms are significantly different from the matched control firms across any of the accounting variables used to estimate my propensity score model. No statistically significant differences at the five percent level were observed between the targeted and matched control firms. (The results are reported in full in Table 5 in the Appendix.) While these tests cannot prove that matching has eliminated selection bias in my estimates, they provide some comfort that there are not glaring observable differences between the "treatment" and "control" groups in both matched sets.

Table 2 reports results from a regression analysis that estimates the average impact of activism on the ANB strength of targeted firms

---

[217] Table 4 in the Appendix reports the results of estimating the statistical model that I use to calculate propensity scores. The model is largely based on the model in Brav et al., *supra* note 216, at 242–43 & tbl.2. Each variable I use is defined precisely in the Appendix. I use logistic regression because it produces predicted values that are bounded between 0 and 1. (For a relatively non-technical overview, see *What Is Logistic Regression?*, IBM, https://www.ibm.com/topics/logistic-regression [https://perma.cc/376S-X4KS].) Logistic regression is a common choice for calculating propensity scores, and was used, for example, in Guernsey et al., *supra* note 46, at 29–30 n.10. In unreported results, I repeat the analysis using a probit model to calculate propensity scores (another standard choice—see, for example, Brav et al., *supra* note 28, at 48) and obtained very similar results.

[218] Additionally, I perform propensity score matching "with replacement," which means that nontargeted firms can be matched to multiple target firms. Finally, in the Appendix, I report results from conducting the same analysis using only the one best match for each targeted firm. The results are similar, though the point estimates are less precise.

in the years after they are targeted. It does so by implementing a simple pre-post comparison of changes in ANB *Strength* and *Word Count* for "treated" (targeted) relative to matched "control" (nontargeted) firms around each activism event.[219] The results suggest a small positive impact. This impact is not statistically significant when *Strength* is used as the dependent variable, and it is statistically significant at the ten percent level when *Word Count* is used instead. On average, targeted firms appear to add 0.12 disclosure provisions (of those I track) and increase their ANB word count by seventy-seven more than the matched controls.

TABLE 2. EFFECT OF ACTIVISM ON ANB STRENGTH (FIVE NEAREST NEIGHBORS)

Dependent Variables:	strength	word_count
Model:	(1)	(2)
Variables		
treat × post	0.1202	76.68*
	(0.0849)	(41.50)
Fixed-effects		
cik_cohort	Yes	Yes
yr_cohort	Yes	Yes
Fit statistics		
Observations	44,242	44,242
R^2	0.85533	0.86215
Within R^2	0.00031	0.00059

Clustered (cik) standard-errors in parentheses
*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

Figure 7 provides additional insight into these results by showing how ANB strength for targeted firms evolves relative to nontargeted

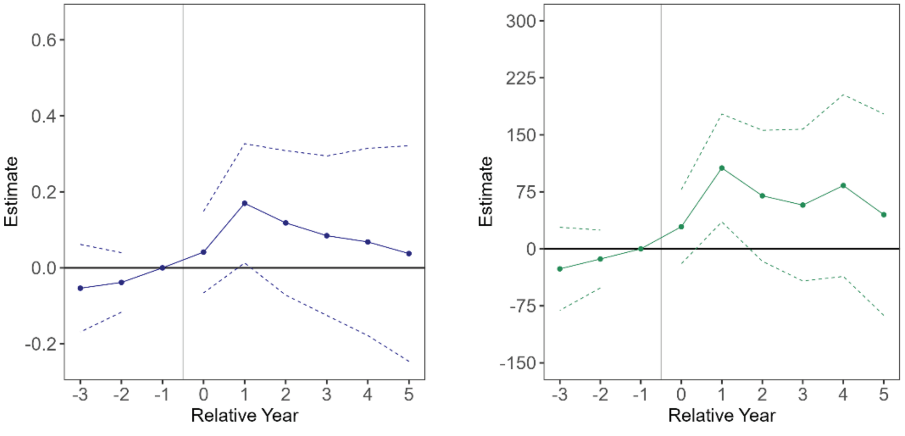
[219] More precisely, Table 2 reports the results of estimating the following two-way fixed effects regression specification for my two matched samples:

$$Y_{ijt} = \beta \cdot \left(Treat_{ij} \times Post_{jt} \right) + \gamma_{ij} + \mu_{jt} + \epsilon_{ijt}$$

Y is the dependent variable for firm i cohort j in year t, which is either *Strength* or *Word Count*. $Treat_{ij}$ is an indicator variable that equals 1 if firm i is one of the "treated" units within cohort j and 0 if firm i is one of the "control" units. $Post_{jt}$ is equal to 1 for all firms in cohort j in the year "treated" firms in cohort j are targeted by an activist and in all subsequent years. γ_{ij} are unit-cohort fixed effects, and μ_{jt} are year-cohort fixed effects. ϵ_{ijt} is an error term. A "cohort" refers to all of the firms targeted in a given year and their matched control firms. Standard errors are clustered at the firm level.

firms in each year.[220] The year prior to the target year is used as a baseline. This Figure shows that in the three years prior to the target year, ANB *Strength* and *Word Count* evolve roughly in parallel for targeted and matched control firms. In the target year, ANB strength starts to creep up for target firms before jumping up in the following year. In this year (the year after the activism event), the increase in targeted firms' ANB *Strength* and *Word Count* relative to the matched control firms is statistically significant at the five percent level. In subsequent years, the gap seems to narrow again as the impact of activism fades.

FIGURE 7. EFFECT OF ACTIVISM ON ANB STRENGTH (FIVE NEAREST NEIGHBORS)



(a) Strength (b) Word Count

220 Figure 7 reports the results of estimating the following regression specification for my two matched samples:

$$Y_{ijt} = \sum_{k=-3,k\neq-1}^{5} \beta_k \cdot \left(Treat_{ij} \times Rel\_Yr_{kjt}\right) + \gamma_{ij} + \mu_{jt} + \epsilon_{ijt}$$

Y is the dependent variable for firm i cohort j in year t, which is either *Strength* or *Word Count*. $Treat_{ij}$ is an indicator variable that equals 1 if firm i is one of the "treated" units within cohort j and 0 if firm i is one of the "control" units. $Rel\_Yr_{kjt} = 1\{t - j = k\}$. In other words, Rel_Yr_{kjt} is an indicator equal to 1 for all firms in cohort j in year t if year t is exactly k years before or after year j (the year "treated" firms in cohort j are targeted by an activist) and 0 otherwise. The β_k coefficients therefore capture the difference in ANB disclosure strength between targeted firms and their matched controls in each year relative to the targeting year. γ_{ij} are unit-cohort fixed effects, and μ_{jt} are year-cohort fixed effects. ϵ_{ijt} is an error term. A "cohort" refers to all of the firms targeted in a given year and their matched control firms. Standard errors are clustered at the firm level. The dashed bands in the plots depict 95% confidence intervals around the β_k coefficient estimates.

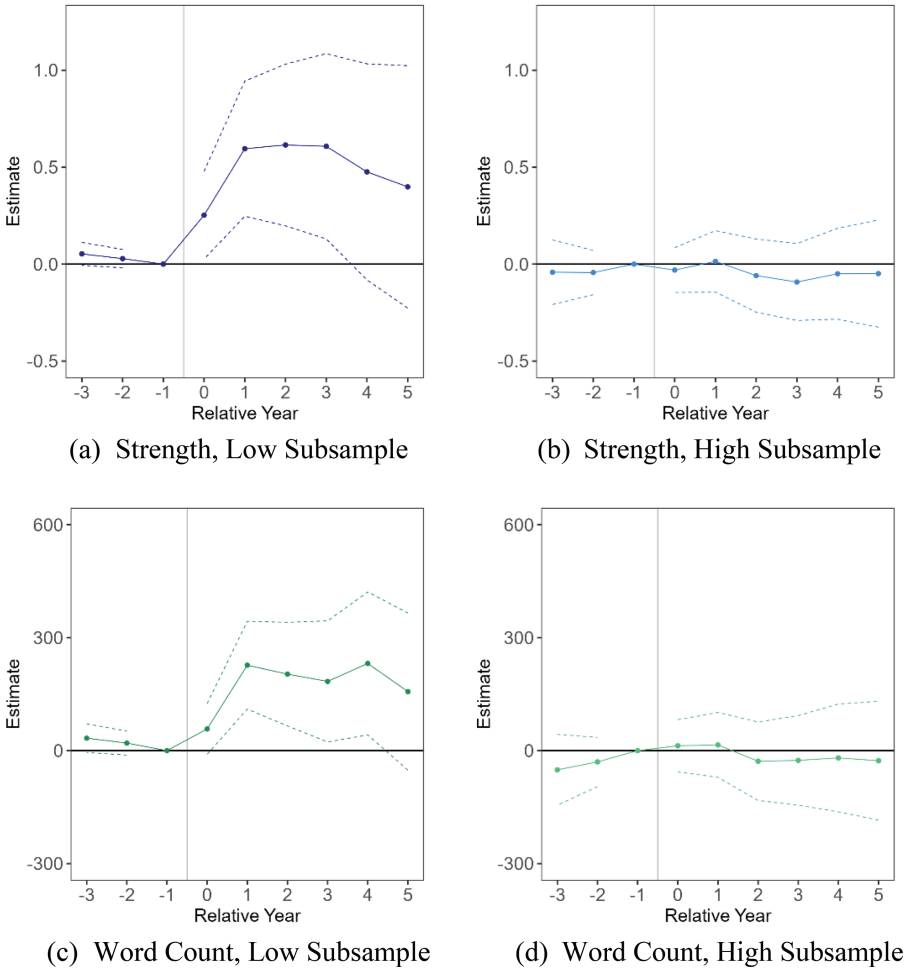
Figure 10 in the Appendix plots the raw averages of *Strength* and *Word Count* for the targeted and nontargeted firms in each year relative to the treatment date.

The upshot of this analysis is that being targeted does appear to spur at least some firms to amend their ANB disclosure requirements. However, this effect is small.

These full sample event study plots do not provide any insight into whether the effects of activism differ across different groups of firms, but knowing this may influence our policy conclusions. For example, one important question is whether firms that amend in response to activism are firms who already had tough ANBs (but want to go even further) or firms that had relatively weak ANBs before the activist appeared. If amending firms are those who already had tough ANBs, we might worry that the effect of activism reflects efforts by entrenched boards to hold onto power. But if the amending firms are those that are "behind the times" and have weak ex ante ANBs, then the effect may be less concerning.

To shed light on this question, I split the sample of targeted and nontargeted firms into two subsamples based on the strength of each firm's ANBs in the year before the treatment year in each cohort. Treated and control firms whose ANBs were weaker than the median firm in their treatment-year cohort were placed in the "Low" strength subsample, and firms whose ANB strength was equal to or greater than the median firms' were placed in the "High" strength subsample. Then, I repeated the event study analysis within each subsample. The results are plotted in Figure 8.

FIGURE 8. ACTIVISM EVENT STUDY—SPLIT SAMPLE



(a) Strength, Low Subsample

(b) Strength, High Subsample

(c) Word Count, Low Subsample

(d) Word Count, High Subsample

Figure 8 shows that the firm-level impact of activism on ANB strength is entirely driven by firms who had relatively weak ANBs before the activist surfaced. On the other hand, firms with relatively strong ANBs appear not to respond to activism at all.

These results are consistent with the theory that Delaware's ANB jurisprudence disincentivizes firms from adopting unusual or extreme provisions on rainy days to shut down activists. As I discussed earlier, Delaware courts scrutinize ANB amendments much more closely when they are adopted on a "rainy day" (i.e., after an activist has shown up).[221]

221 *See supra* discussion of case law in Section II.C.

Therefore, it makes sense that firms with relatively tough requirements would be cautious about adding disclosure provisions to their ANBs once an activist has appeared. On the other hand, firms with relatively weak requirements seem less deterred from getting "up to speed."

V
POLICY

In this Part, I discuss whether changes should be made to the law currently governing ANBs based on what we know about their development and current market practice. At the outset, I note that the conclusions I can draw about optimal policy are limited because the literature on the benefits of hedge fund activism is conflicting.[222] If, as some scholars believe, hedge fund activism generally hurts the long-term health of public companies or harms corporate stakeholders (like employees and customers),[223] then the best path forward may be for courts to stop scrutinizing ANBs and let boards adopt onerous provisions. On the other hand, if hedge fund activism improves companies' long-term performance in enough cases,[224] then boards' authority to adopt ANB amendments should have some limits.

Going forward, I assume for the sake of discussion that the market contains activists whose interventions are generally value-enhancing and those whose interventions are not. I identify several costs associated with the current state of ANB practice, which is characterized by (1) a high and increasing *level* of disclosure requirements and (2) high and increasing *variability* in disclosure requirements across firms. I also argue that the benefits of many of the newer and less common disclosure requirements are comparatively modest. Finally, I propose reforms aimed at mitigating the costs I identify without destroying the benefits of ANBs. In discussing proposed reforms, I highlight both their strengths and their weaknesses so the analysis will be useful to readers with a range of views.

A. Potential Costs of Current Practice

The main argument against allowing companies to adopt high levels of ANB disclosure requirements is that complex, broad, invasive, and ambiguous requirements decrease board accountability (and therefore company value) by raising the cost of value-enhancing activism. In general, an activist will target a firm when they expect to earn a return

222 *See supra* discussion of the literature in Section I.B.
223 *See supra* notes 66–69 and accompanying text.
224 *See supra* notes 63–67 and accompanying text.

on their investment in the firm that is higher than the cost of running a campaign.[225] So, if the cost of running a campaign becomes more expensive because firms adopt tough disclosure requirements, then activists will no longer be willing to launch campaigns with relatively low (but still positive) expected payoffs. For those who subscribe to the view that activists make money by replacing underperforming managers or increasing companies' efficiency, these lost campaigns are a significant social cost.

1. How Tough Disclosure Requirements Increase Costs

ANBs increase activists' costs through three primary channels. First, an ANB's nomination window increases the amount of time an activist has to hold stock in the target leading up to a proxy fight, preventing the activist from deploying their capital in other (potentially more profitable) ways. This holding period could be particularly costly if the company is performing poorly and the incumbents are unwilling to make changes. However, since extremely long nomination windows are becoming less and less common, this cost is not a primary concern.

Second, and more importantly, an ANB's disclosure provisions increase the legal fees an activist has to spend to run a proxy contest. To start the nomination process, an activist must hire lawyers to find and parse the target firm's disclosure requirements. Parsing the requirements often requires familiarity, if not expertise, with federal securities laws. The lawyers then need to hunt down all of the information needed to satisfy the requirements and draft a nomination notice. They usually also need to fill out a questionnaire for each director, and as the Court of Chancery has made clear, these questionnaires can be incredibly detailed and require research into issues outside the wheelhouse of the corporate lawyers principally advising the activist.[226] With all of the pieces involved, the cost of complying with modern ANBs could easily run into the hundreds of thousands of dollars.[227]

---

225 This cost includes opportunity costs, such as the return the activist could achieve investing in other assets.

226 *See* Saba Cap. Master Fund, Ltd. v. BlackRock Credit Allocation Income Tr., No. 2019-0416, slip op. at 14 (Del. Ch. June 27, 2019), *aff'd in part, rev'd in part* 224 A.3d 964 (Del. 2020) (describing a questionnaire requiring disclosure, among other things, of whether the proposed nominees had "knowingly engaged" in any "activity that meets the criteria for sanctions under the [Iran Sanctions Act of 1996]" or the "Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010").

227 For example, even if the requirements were simple enough that an experienced associate and a junior associate could pull everything together in a couple of weeks, the cost might be around $120,000 ($1,000 × 80 hours + $500 × 80 hours). With a more complex set of requirements and with partners involved, the cost could easily balloon.

Furthermore, the cost of litigating the scope and applicability of ANBs could dwarf the cost of complying with them. An activist and their advisers may think that they have complied with a company's notice requirements, but the company's board makes the first determination about whether a notice is sufficient. If the board thinks a nomination notice is deficient, the board can unilaterally reject the notice and refuse to list the activist's nominees on the company's universal proxy card.[228] Then, the activist's only recourse is to run to court and sue the board for violating their bylaws' terms or breaching their fiduciary duties. Complex commercial litigation is extremely expensive, even in Delaware's speedy and specialized court system. Having to litigate the validity or applicability of a company's bylaws could send an activist's legal fees into the millions of dollars.

Note that legal costs associated with ANB disclosures are particularly severe for provisions that are complex, broad, or ambiguous. The more complex, broad, or ambiguous a disclosure requirement is, the more likely it is that a board will be able to identify an arguable deficiency in an activist's notice. Because boards can unilaterally reject deficient notices, if there is a sufficiently high probability that any notice will be deficient, then the board effectively has discretion to decide whether to accept or reject a given notice.

It bears emphasizing that under some modern disclosure requirements, it is plausible that almost any nomination packet could be deemed deficient. For example, in *Kellner*, Vice Chancellor Will flagged an ANB provision requiring disclosure of the nominating stockholder's (and others') interests in the target company's principal competitors, noting that the term "principal competitor" was ambiguous and did not have any clearly ascertainable limits.[229] The Vice Chancellor also highlighted provisions that required disclosures about "Stockholder Associated Person[s]," who were defined broadly enough to include "the mother of an associate of a beneficial holder" or "the estranged sister of a nominee."[230] She pointed out that these provisions made it essentially impossible for an activist to submit an unassailable notice.[231]

Third, intrusive ANB disclosure provisions can impose less tangible costs on activists. Some information is sensitive enough that revealing

---

[228] *Compliance and Disclosure Interpretations: Proxy Rules and Schedules 14A/14C*, U.S. Sec. & Exch. Comm'n, at Question 139.04, https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/proxy-rules-schedules-14a14c [https://perma.cc/2683-BWCX].

[229] Kellner v. AIM ImmunoTech, Inc. (*Kellner I*), 307 A.3d 998, 1034 (Del. Ch. 2023), *aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024).

[230] *Id*. at 1029–30.

[231] *See id*. at 1030–31.

it could have negative future consequences for the activist's business. For example, as discussed earlier, Masimo temporarily adopted bylaws that would have required activists to disclose the identities of their investors.[232] Investors in hedge funds expect that their investments will be kept private.[233] If an activist had disclosed this information to Masimo, it might have damaged its reputation in the marketplace and lost investors. Masimo's bylaws also required activists to disclose their plans to nominate directors at other companies.[234] If an activist were to disclose such plans, it seems likely that other investors would "front-run" the activist by buying stock in the future targets, raising their stock prices, and erasing any returns the activist hoped to earn from getting involved. Both disclosure requirements therefore impose future business costs on activists that are distinct from holding period costs or legal expenses.

2. How Increased Costs Affect Activism

Because tough disclosure requirements raise the costs of running a proxy fight, they should reduce the number of viable proxy fights relative to a world without ANBs (or with only straightforward and uncontroversial requirements). If the expected cost of running a proxy fight is higher than the expected payoff, an activist will not run one.[235] Therefore, if the cost of running a proxy fight at a company increases, fewer campaigns will be worthwhile, and the company should face fewer proxy fights.

In addition, the cost of running a proxy fight can also affect the outcome of campaigns that were never destined to end at the ballot box. For instance, companies with complex ANBs should, on average, be able to negotiate for more favorable settlement terms with activists than comparable companies without ANBs.[236] In general, whether the

---

232 *See supra* notes 118–57 and accompanying text.

233 *See* Leonard Wood, Kai H.E. Liekefett & Derek Zaba, *Advance Notice Bylaws After* Kellner*: Still Advisable and Require Not Flying Too Close to the Sun*, Harv. L. Sch. F. on Corp. Governance (July 27, 2024), https://corpgov.law.harvard.edu/2024/07/27/advance-notice-bylaws-after-kellner-still-advisable-and-require-not-flying-too-close-to-the-sun [https://perma.cc/57R2-S9TH] ("[I]t is axiomatic in the investment fund industry to keep the identities of limited partners confidential . . . .").

234 *See supra* notes 118–57 and accompanying text.

235 Here, I mean "expected" in the mathematical sense of a probability-weighted payoff (rather than the colloquial sense of the most likely payoff).

236 More campaigns end with the company entering into a settlement agreement with the activist than end with a proxy fight. *See* Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. Fin. Econ. 1, 5 (2020). In a typical settlement, the company might give the activist a few seats on the board in exchange for a promise that the activist will not agitate against the company for a set period (called a "standstill"). *Id.* at 4.

terms of a settlement are more favorable to the activist or the incumbent board depends on which party has the stronger negotiating position. The strength of each party's position depends on its outside options. If an activist can abandon settlement negotiations and win multiple board seats in a proxy fight, the target board will have a hard time refusing the activist's demands for board seats.[237] But if an incumbent board knows that winning a proxy fight is not feasible or cost-effective for an activist, the board will find it much easier to refuse. Thus, if a company adopts ANBs that make a proxy fight prohibitively costly (or even less attractive) for an activist—or if the company's board knows that it could reject the activist's nominations for noncompliance with some vague provisions—the activist's threat to run a proxy fight will be less credible, and the activist will be in a weaker negotiating position.

Altogether, the fact that ANBs make proxy fights less profitable and settlements less favorable to activists may be enough to dissuade activists from pursuing some target companies at all. This could lead to a reduction in activist campaigns at companies with strong ANBs.

Finally, it is important to note that the increased costs flowing from ANBs affect activists' decisions even if activists expect to be reimbursed for their campaign expenses in a settlement or if they win a proxy fight, as is the case in many modern contests.[238] An activist is a shareholder of the firm, so they have to bear their proportional share of both the company's fight costs and their own costs (that the company reimburses). Additionally, as long as the activist does not have a 100% chance of winning a proxy fight, the activist bears the risk of losing and paying all of their costs, without reimbursement. If a campaign ends in a settlement, the activist's expenses may not be reimbursed entirely, or at all, depending on the circumstances. For a campaign to be worth waging, an activist must anticipate a high enough expected payoff to offset these risks. Ambiguous and complex ANBs also increase the probability of a failed campaign because they increase the probability that the activist will have their nomination rejected.

3. Larger Effects for Small Firms, Small Activists, and Entrenched Boards

If two different firms adopt the same ANBs, it is possible for those ANBs to have different effects for two main reasons. The first is that

---

[237] This theory is supported by the empirical research. *See id.* at 1 (finding that "[s]ettlements are more likely when the activist has a credible threat to win board seats in a proxy fight").

[238] *Id.* at 7 n.11 ("[M]any settlements specify that the activist is reimbursed part or all of its contest-related expenses.").

the cost of complying with a particular set of ANBs is essentially a fixed dollar amount, but an activist's expected payoff depends on the size of the activist's investment. When an activist makes a small-dollar investment in a target, the cost of completing a nomination notice weighs on the activist's expected return. But as an activist's investment becomes larger, the nomination costs fade into insignificance.

This means that for the largest public companies—which tend to be targeted by large activists with lots of resources at their disposal[239]—enhanced disclosure provisions probably do not have much of an effect. Consider, for example, a recent proxy fight at Disney. Disney's market capitalization was approximately $220 billion around the time of the shareholder vote on March 28, 2024, and the primary activist, Trian Fund Management, owned a 1.8% stake worth nearly $4 billion.[240] Trian spent around $25 million on its campaign, according to some preliminary estimates. For an activist willing to invest nearly $4 billion and spend $25 million out of pocket to fund a campaign, it seems unlikely that the cost of complying with some extra disclosure provisions would matter much, even with the looming possibility of bylaw-related litigation.

But for small-cap and micro-cap companies and the small activists that typically target them, ANBs likely matter a lot more. Small activists have fewer assets under management than big players like Trian and are limited in how much they can invest in any one company. With less money to throw around, these activists are more sensitive to costs. Additionally, if small activists try to keep their costs down by hiring inexpensive (and likely less experienced or qualified) legal counsel, they increase their risk of submitting a deficient notice.

Lastly, ANBs with complex, broad, and ambiguous disclosure provisions likely impose greater costs at companies with entrenched or disloyal boards. This is because, as discussed earlier, broad and ambiguous provisions give boards more discretion to reject nomination notices, and disloyal boards may be more likely to use their discretion to reject notices from even credible, value-enhancing activists. This means that ANBs likely raise the cost of activism most in precisely the situations in which activism is most likely to be beneficial.

---

239 Engine No. 1's recent proxy fight at Exxon Mobil is an exception to this general rule. *See* Phillips, *supra* note 5 (noting that Engine No. 1 held only 0.02% of shares of Exxon).

240 Katherine Tangalakis-Lippert, *Trian's $25 Million Battle for Disney Board Seats Could Be Nelson Peltz's Last Fight as the Most Powerful Activist Investor on the Market*, Bus. Insider (Mar. 20, 2024), https://www.businessinsider.com/trian-waging-25-million-war-disney-board-seats-nelson-peltz-2024-3 [https://perma.cc/7SSS-SMC9].

4. Additional Costs of a Lack of Market Standard

In addition to showing that ANB disclosure requirements have become stronger over time, the data also shows that market practice for drafting ANB disclosure provisions is not clearly converging to a market standard.[241] To the contrary, the evidence suggests that ANB drafting is highly variable and continues to change significantly over time as new provisions (e.g., interview requirements) are invented and old provisions (e.g., questionnaires) change in popularity.

Given the conventional wisdom that corporate law's flexible structure allows "efficient tailoring,"[242] it may seem counterintuitive that drafting variability and evolving standards present a potential problem. Nonetheless, ANBs' drafting variability and rapid evolution raise at least three types of costs for shareholders:

(1) **Nomination Costs**. Ever-evolving and highly variable drafting practices raise the legal costs to shareholders of nominating candidates for director elections. If a shareholder wants to nominate a director candidate, the shareholder must first figure out how to file a compliant nomination notice by reviewing the target's bylaws. If many companies' bylaws are drafted differently and require different disclosures, then it becomes very difficult for activists and their legal advisers to streamline the nomination process. This makes each nomination more time-consuming for the lawyers and, therefore, more expensive for the activist. On the other hand, if ANB drafting were consistent across all firms, then the legal advice required to comply could become commoditized and relatively inexpensive. Note that these increased nomination costs are, to some degree, independent of and additional to the costs I discuss above that flow from having a high overall level of disclosure requirements. Therefore, these additional costs further decrease the amount of feasible, value-enhancing activism.

(2) **Monitoring Costs**. Drafting variability and rapidly evolving practices can also be costly to shareholders who would never nominate a director candidate but are nonetheless serious about their role in holding boards accountable. It is difficult and time-consuming for proxy advisers and institutional investors to keep up with current practices when practices vary a lot or are constantly changing. This makes it difficult for them to decide whether they should be concerned about the provisions

241 *See supra* discussion in Section III.C.

242 Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 132–33 (2018).

companies are adopting and whether they should push back by, for example, withholding their votes from incumbent directors or raising their concerns in private engagements.

(3) **Litigation Costs**. Drafting variability likely increases litigation costs for activists. This is because it takes more court challenges for courts to have the opportunity to test, scrutinize, and interpret all of the different provisions and drafting variations. Activists are probably also more likely to challenge nonstandard provisions and provisions that they are unsure about how to comply with (perhaps because they do not have much experience with them).

Drafting variability and frequently evolving standards also increase costs for companies (and by extension their shareholders) because they increase companies' legal spending. If all ANBs were generally drafted the same way, then updating a company's ANBs would be quick and inexpensive. The company's lawyers would only have to copy and paste in the current market standard provisions. But if drafting varies a lot, then a company's lawyers have to spend more time assessing the board's risk tolerance and preferences to select an appropriately customized set of provisions. And if practice is evolving regularly, companies have to pay counsel to amend their bylaws more often to have up-to-date provisions.

B. Potential Benefits of Current Practice

The most widely accepted benefit of ANBs is that they facilitate orderly, informed elections. The idea is that shareholders will make better voting decisions if the board has ample time to make its case to shareholders and the proxy solicitation and voting processes are not disrupted by surprise nominations. This argument is important, largely uncontroversial, and regularly cited by courts when they rule in ANB cases.

This argument alone, however, is not sufficient to defend complex, modern ANBs. Given the SEC's proxy solicitation rules, even basic ANBs can ensure orderly elections. As long as the board knows that the election will be contested and knows the identity of the nominating shareholder and their nominees 90 days before the anticipated election date (as is the standard), the board will be able to timely prepare its proxy statement in line with the SEC's rules, and the SEC's rules will ensure that shareholders receive detailed information about both the board candidates and the activist's candidates well in advance of the election.[243]

[243] *See supra* notes 73–75 and accompanying text.

It is also unpersuasive to argue that ANBs containing disclosure requirements beyond those required by the SEC benefit shareholders by providing them with additional information.[244] For enhanced disclosure requirements to help shareholders get information, four things all need to be true: (1) material information about the activist needs to exist that would not be disclosed in its proxy statement, (2) the ANBs need to require disclosure of that information, (3) the activist needs to disclose the information in its notice, and (4) the board has to share the information with shareholders. It seems feasible for the first two conditions to be true, but the last two are less clear. To my knowledge, shareholders never see the contents of activists' nomination notices, so the fact that the board knows more about the activist does not help the shareholders cast more informed votes. Additionally, it's not clear that boards have any way to ensure that activists disclose material information that is unknown to the board. A board can only reject a notice with deficient disclosures if it knows (or perhaps has strong reasons to suspect) that information is being withheld. Therefore, to enforce their disclosure requirements, boards need to use other investigatory tools to identify omissions. But if they can already gather the information necessary to spot deficiencies using other tools, it's not clear why ANB requirements are also necessary for information-gathering.

Two other potential benefits of enhanced disclosure requirements merit consideration. The first is that enhanced disclosure requirements allow boards to screen out election contests that are so meritless or destructive that allowing them to proceed would waste corporate resources and shareholder time. A contest might be meritless if the activist is unsophisticated and unlikely to add value or if the activist is a bad actor who is deliberately obscuring information material to shareholders. The second is that enhanced disclosure requirements reduce the overall likelihood of activism, which may be value-destructive or harmful to corporate stakeholders.

Both of these potential benefits could be substantial, but they come with a lot of uncertainty. First, allowing boards to pick and choose the election contests that go forward makes it possible for boards to limit activism in a socially beneficial way. But there is no guarantee that they will actually do so. Instead, board members may be tempted to shut down value-enhancing contests in order to keep their positions. The only check on boards' screening decisions comes through ex post litigation,

---

244 *See, e.g.*, Kellner v. AIM ImmunoTech Inc. (*Kellner II*), 320 A.3d 998, 258 (Del. Ch. 2023) (suggesting that ANB disclosure provisions help shareholders cast "well-informed votes" (quoting Paragon Techs., Inc. v. Cryan, No. 2023-1013, 2023 WL 8269200, at *7 (Del. Ch. Nov. 30, 2023))).

which is costly, time consuming, and imperfect. It is also important to point out that the concept of a company's board deciding when its shareholders are able to vote for opposing candidates lies in tension with the basic structure of corporate law, which gives shareholders the power to elect a board of directors.

Second, as discussed previously, the argument that reducing activism is socially beneficial rests on an empirical foundation that is murky and hotly contested.[245] The same can of course be said about the opposing argument that reducing activism is socially costly. Because this paper does not take a stand on which view is ultimately correct, readers should weigh for themselves the potential benefits of reduced levels of activism in deciding whether the reforms I discuss below are worth pursuing.

Finally, I note that none of the potential benefits I have discussed (orderly elections, informed voting, board screening, and reduced activism) seem directly connected to the high level of variability in bylaw terms we see across firms. In other words, all of the same benefits could be delivered at a lower cost by an appropriate, standardized set of ANBs. The main benefit of variability is that different companies may benefit from different levels of board control over activism.

C. Legal and Institutional Factors Driving Current Trends

To identify reforms that could reduce some of the costs I have identified, it is useful to first consider features of Delaware law and traditional corporate governance arrangements that have contributed to current trends. The first set of features are those that restrict shareholders' ability to participate in the process of selecting corporate bylaws. Structural features of traditional corporate governance arrangements and Delaware law make it difficult for shareholders to push back against bylaw changes made by corporate boards that they do not like.[246] For example, almost all corporate charters give the board of directors power to unilaterally adopt and amend bylaws. In contrast, shareholders' power to amend bylaws is limited by shareholders' collective action problem and, in some instances, by law.[247] Relatedly, shareholders do not receive notice of bylaw amendments until after

[245] *See supra* discussion of empirical evidence on the effects of hedge fund activism in Section I.B.

[246] *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 Calif. L. Rev. 373, 377 (2018); Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 Iowa L. Rev. 1, 1 (2018).

[247] Fisch, *supra* note 246, at 382–99 (describing both statutory and practical limits on shareholders' power to amend bylaws).

they occur, so shareholders who dislike the amendments cannot sever their relationship with the company by selling their shares until after "[t]he damage is already done."[248] These factors may be preventing shareholders from serving as an effective constraint on boards' drafting practices.

The second set of features relates to Delaware's ANB jurisprudence. One such feature is the Delaware courts' ability to "blue-pencil" (or selectively enforce) ANB provisions that were adopted with a proper motive but that they find to be unreasonable.[249] This power allows courts, in some cases, to pare down questionable ANB provisions until they reach a permissible scope rather than strike them out entirely. In a recent blog post, Professor Ann Lipton pointed out that this approach creates a "no-lose situation" for target boards[250]: Boards can draft ANBs "as broadly as possible, confident that the scope of the [requirements] will chill some [activists]," all the while knowing that "the worst case is that the court will blue-pencil [the requirements'] scope so that [they are] acceptable."[251] More broadly, this blue-penciling approach encourages experimentation and nonstandard drafting because the consequences of doing so for the board are minimal, even if the board goes too far.

A final feature of Delaware law that may be contributing is that Delaware courts have a very high standard for finding that ANBs are facially invalid (the first test in *Kellner*).[252] ANBs are only facially invalid if they "cannot operate lawfully or equitably under any circumstances"[253] or are "unintelligible."[254] On a clear day, boards can adopt vague, sweeping, complicated, and invasive disclosure provisions that might chill activism with very little risk of being challenged. In fact, most ANBs can effectively only be subjected to "as-applied challenges in

248 Choi & Min, *supra* note 246, at 30.

249 Ann Lipton, *More Thoughts About Advance Notice Bylaws*, Bus. L. Prof. Blog (Feb. 16, 2024), https://www.businesslawprofessors.com/2024/02/more-thoughts-about-advance-notice-bylaws [https://perma.cc/33CF-SDZA]; *see also Kellner II*, 320 A.3d 239, 261 (Del. 2024) ("[If] the bylaws were adopted for a proper purpose but some of the advance notice provisions were disproportionate to the threat posed and preclusive, the Court of Chancery has the discretion to decide whether to enforce, in whole or in part, the bylaws that can be applied equitably.").

250 Lipton, *supra* note 249 (quoting Sunder Energy, LLC v. Jackson, 305 A.3d 723, 753 (Del. Ch. 2023) (discussing the blue-penciling problem in the context of non-compete clauses)).

251 *Id.*

252 *See supra* notes 136–47 and accompanying text.

253 *Kellner II*, 320 A.3d at 258.

254 *Id.* at 263.

equity," which can only occur when there is a live election contest.[255] This fact leaves boards quite free to experiment with adding new disclosure provisions, as long as they do so before an activist surfaces.

One feature of Delaware law that does *not* seem to be contributing to the proliferation of ANB variations is Delaware courts' skepticism of rainy-day ANB amendments.[256] The evidence I presented previously suggests that companies amend their bylaws on rainy days relatively infrequently and only if they have relatively weak disclosure requirements when the activist appears.[257] This suggests that the Delaware courts' enhanced scrutiny jurisprudence is having a deterrent effect on tactical amendments after an activist has appeared.

D. Evaluating Potential Reforms

In prior work, several scholars have suggested general policy reforms that might reduce the problems caused by directors' ability to unilaterally adopt and amend bylaws. These include strengthening shareholders' right to "undo or amend" director-adopted bylaws,[258] requiring companies to disclose bylaw amendments before they become effective,[259] requiring shareholders to vote on all bylaw amendments,[260] and increasing judicial scrutiny of all unilateral bylaw amendments.[261] Additionally, Professor Ann Lipton recently floated an ANB-specific reform idea that involved amending the DGCL to spell out permissible ANB provisions while adopting a rule that, if any provisions above the permissible floor are struck down, all provisions above the floor are thrown out.[262] These ideas are all interesting and worth considering, and

---

255 Andre G. Bouchard, Chelsea N. Darnell, Jaren Janghorbani, Robert A. Kindler, James E. Langston & Laura C. Turano, *Paul Weiss Discusses Delaware Supreme Court Clarification of Tests for Advance Notice Bylaw Challenges*, CLS Blue Sky Blog (July 30, 2024), https://clsbluesky.law.columbia.edu/2024/07/30/paul-weiss-discusses-delaware-supreme-court-clarification-of-tests-for-advance-notice-bylaw-challenges [https://perma.cc/PDZ9-ZXJ7]; *see also* Beth E. Berg, Charlotte K. Newell, Loren Braswell & Arthur E. Adler, *Sunshine Breaking Through the Clouds: Delaware Supreme Court Sheds Light on Standard of Review for Challenges to Advance Notice Bylaws*, Sidley (July 15, 2024), https://www.sidley.com/en/insights/newsupdates/2024/07/delaware-supreme-court-sheds-light-on-standard-of-review-for-challenges-to-advance-notice-bylaws [https://perma.cc/QL75-ZXSL]; *see also Kellner II*, 320 A.3d at 258–59 (quoting Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 949 (Del. Ch. 2013) for the proposition that there must be a "genuine, extant controversy" for equitable review of the "adoption, amendment, or application of bylaws").

256 *See supra* discussion of ANB jurisprudence in Section II.C.

257 *See supra* data analysis in Section IV.B.

258 Choi & Min, *supra* note 246, at 36; *see also* Fisch, *supra* note 246, at 400–01.

259 Choi & Min, *supra* note 246, at 35.

260 *Id.* at 35–36.

261 *Id.* at 38–44.

262 Lipton, *supra* note 249.

I direct readers to these scholars' articles for an analysis of the strengths and weaknesses.[263]

Here, I consider three potential reforms that depart from prior work in that they are both ANB-specific and do not require a legislative attempt to determine which disclosure provisions are acceptable.

1. Required Vote on Election Bylaws

The first potential solution would be to amend the DGCL to require a shareholder vote on all amendments of bylaw provisions that govern board elections or nomination procedures.[264] This approach has several benefits. First, it would likely slow the pace of ANB amendments because it would require boards to take the time to get them approved. Second, and even more importantly, this reform would nudge large shareholders to pay more attention to ANBs and give them a way to express their views. This would facilitate private ordering that could curb the extreme variations we see in modern ANBs.[265]

One weakness of this approach is that it would not reverse the wide variation that has already proliferated. Another downside is that it would increase the number of items on which institutional investors are required to vote. Investors have limited time to allocate across the numerous votes they are required to cast, and ANB votes could become a burden. It is also not clear whether investors would spend enough time on them for the votes to be meaningful. ISS and Glass Lewis would likely respond by developing more granular ANB voting policies, but

---

[263] Some other ideas include: (1) reinterpreting or amending the DGCL in a way that places fewer limits on shareholders' power to amend bylaws, Fisch, *supra* note 246, at 400–01; (2) amending the DGCL to follow the Model Business Corporations Act, which "authorizes shareholders to insulate any shareholder-adopted bylaw from board override," *id.* at 389; (3) giving shareholders the right to sell their shares back to the company if they dislike a proposed amendment, Choi & Min, *supra* note 246, at 33.

[264] In 2023, some shareholders filed shareholder proposals to try to push companies to obtain shareholder approval of certain ANB amendments. Doug Schnell, Sebastian Alsheimer & Daniyal Iqbal, *Developments with Universal Proxy Cards and Advance-Notice Bylaws*, Harv. L. Sch. F. on Corp. Governance (June 17, 2024), https://corpgov.law.harvard.edu/2024/06/17/developments-with-universal-proxy-cards-and-advance-notice-bylaws [https://perma.cc/6ZQX-4AGJ].

[265] Currently, if institutional investors want to express their views on ANBs, their best tool for doing so is to withhold their votes from directors who adopt them. *See* Fisch, *supra* note 246, at 391–92. However, withholding votes is a blunt tool, and without clear communication about why shareholders are withholding votes, it is not clear that directors would get the message to change their ANBs. Institutional investors can also try complaining to boards about their ANBs behind the scenes, but investors' time and energy for these types of engagements are limited and probably best spent on other issues.

this could just end up transferring more power to these proxy advisers, which have drawn scrutiny for their influence in corporate voting.[266]

Choi and Min consider the idea of requiring shareholders to vote on all bylaw amendments, but they quickly dismiss the idea.[267] They reason that this approach would eliminate the flexibility provided by unilateral bylaw amendments, which is useful in many cases.[268] However, their concern would be addressed in many cases if a vote were required only for election-related bylaws.

2. Added Time to Cure Deficiencies

A second possible solution would be to require companies to give shareholders some time to cure disclosure deficiencies, particularly for deficiencies in responding to ambiguous and contestable ANB provisions.[269] This could be accomplished either through Delaware courts' use of equitable powers to require time to cure in cases where the company's bylaws were found to be unreasonable, or through legislative or regulatory reform. This change would likely lower the cost to activists of complying with ANBs. It would also likely mitigate the incentives to over-innovate created by the courts' ANB jurisprudence, because it would cause ambiguous and potentially overbroad ANBs to have less of a chilling effect on activism. Activists would know that, as long as they made a good faith effort to comply with a particular provision, their nominations would not be thrown out, and they would get a chance to correct any omissions identified by the board (and perhaps confirmed by the court). Further, if courts started regularly ordering companies to provide time to cure deficiencies, companies might start offering time to cure on their own, outside of court, reducing the amount of ANB-related litigation.

It is also possible that companies could be pushed to allow time to cure purely through private ordering. In 2024, corporate governance maven James McRitchie became interested in this idea and filed several "Right to Cure" shareholder proposals asking companies to put a

266 *See, e.g.*, Ike Brannon, *The Need to Diminish the Power of Proxy Advisory Firms*, Forbes (June 13, 2022), https://www.forbes.com/sites/ikebrannon/2022/06/13/the-need-to-diminish-the-power-of-proxy-advisory-firms [https://perma.cc/RYA4-MQA] (expressing concern at the concentration of the proxy advisory market and the outsized influence that the two largest firms, ISS and Glass Lewis, have on shareholder votes).

267 Choi & Min, *supra* note 246, at 35–36.

268 *Id.*

269 The SEC rules governing shareholder proposals do something similar. Rule 14a-8(f) requires companies to notify shareholders of deficiencies (other than missed deadlines) and to give them fourteen calendar days to cure. 17 C.F.R. § 240.14a-8(f) (2024). It might also be possible for the SEC to amend Rule 14a-19 to require time to cure deficiencies for nominations that will be placed on a universal proxy card.

provision in their bylaws that gives nominating shareholders fourteen days to cure deficiencies.[270] At least one company has implemented a process for curing deficiencies in response to McRitchie's proposal.[271] Whether this trend will lead to widespread changes remains to be seen.

The trouble with this approach is that it could encourage gamesmanship by activists. Activists might be too willing to avoid complying with provisions they simply do not like in the hopes that they will get away with it (because the company decides not to challenge or because they can fool the judge into thinking their noncompliance was in good faith).

3. Imported "Overbreadth" Doctrine

A third possibility is that courts could lower the standard for finding ANBs to be facially invalid by allowing plaintiffs to show that certain disclosure provisions are so sweeping that they are likely to chill nomination attempts. This would be analogous to importing the "overbreadth" doctrine from First Amendment jurisprudence regarding facial constitutional challenges to statutes.[272] This change would allow plaintiffs to challenge clear-day ANB adoptions—particularly those with ambiguous or extreme elements—that otherwise could not be challenged without a live election controversy but that might nonetheless chill beneficial activism.

The main benefit of this approach is that it would reduce the number of boards adopting ANBs that chill nominations. This would be beneficial if vague ANBs are currently reducing the amount of productive shareholder activism at U.S. companies. Another benefit is that it would reduce the blue-penciling problem because more overbroad bylaws would be facially invalidated rather than subjected to judicial editing. This, in turn, would decrease boards' incentive to push the envelope with ANB amendments. This approach could also increase the level of certainty for shareholders in election contests

---

[270] James McRitchie, *Right to Cure*, CorpGov.net (July 27, 2024), https://www.corpgov.net/2024/07/right-to-cure [https://perma.cc/B8L9-6LPA].

[271] Costco Wholesale Corporation, Form 8-K (Sept. 16, 2024), https://www.sec.gov/Archives/edgar/data/909832/000090983224000039/cost-20240916.htm [https://perma.cc/5SEQ-WULU].

[272] There is an analogy here to First Amendment case law that recognizes an "overbreadth" doctrine. Lewis D. Sargentech, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845–46 (1970). In constitutional law cases, statutes (analogous to ANBs here) are generally held to be facially invalid only if a plaintiff can "establish that no set of circumstances exists under which the [law] would be valid." Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). However, an exception has been recognized in First Amendment cases for statutes that are so overbroad that the threat of punishment chills constitutionally protected activities. *See id.*

because shareholders could iron out ANB-related issues before seeing an activist's nomination notice get rejected.

One downside of this change is that it could increase the amount of unproductive activism targeting public companies. It is difficult to predict, however, to what extent this downside would result, because it is difficult (if not impossible) to tell with existing data what kind of activism (if any) is currently being chilled by vague and overbroad bylaws.

Another downside of this change is that it would increase the risk of frivolous, bylaw-related litigation. Mergers in the United States are frequently accompanied by frivolous lawsuits seeking additional disclosures.[273] The reason for this is that the cases are usually resolved when the company makes the sought-after disclosures (thus mooting the lawsuit) and then pays a "mootness fee" to the plaintiffs' lawyers.[274] If ANBs were easier to challenge, plaintiffs' lawyers could use a similar tactic to extract mootness fees for ANB-related cases.[275] They could challenge a company's decision to adopt new ANB provisions, and then demand payment of a "mootness fee" once the company has tweaked the provisions to moot the plaintiffs' challenge. Some of these lawsuits might be genuinely meritorious, but many others might not be.

One way to alter the third approach to reduce the risk of frivolous litigation would be to combine it with the suggestion made by Lipton mentioned previously.[276] The idea would be to allow all firms to safely adopt a litigation-proof set of widely accepted ANB provisions and optionally innovate new provisions that would be subject to greater scrutiny. This combined approach would impose more discipline on amendments that are currently free from scrutiny, while simultaneously allowing companies to avoid litigation by staying within certain guardrails.

E. Change Through Private Ordering?

The classical view of shareholders is that they face collective action problems in dealing with management and are therefore "rationally

---

273 *See* Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, Essay, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 604–05 (2018) (noting that "over 96% of publicly announced mergers" are followed by a lawsuit and that many of these are "disclosure-only" suits that critics view as "frivolous").

274 *See generally* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777, 1777 (2019) (describing the practice of resolving merger litigation through "voluntary dismissals that provide no benefit to the plaintiff class but generate a payment to plaintiffs' counsel").

275 There is some evidence that this is already happening. *See* McNally et al., *supra* note 107.

276 *See supra* note 262 and accompanying text.

apathetic."[277] Under this view, we cannot expect them to push for changes in ANB practice.

There is a counterargument to this view, however. We increasingly live in a world where large institutional investors are choosing to exercise their influence over the governance arrangements companies choose to adopt.[278] It may be the case that ANBs have not shown up on the agendas of most institutional investors yet, but when they do, these investors will start exercising their influence to move the ANB market from its current state of variation toward a set of standards.

The data and some recent events suggest that an institutional investor backlash against modern ANBs is already underway. As discussed earlier, some evidence suggests that the prevalence of less-common ANB amendments dropped in 2023 relative to 2022.[279] Further, in 2023, shareholder proposals were filed at "[a]t least 30 companies . . . seeking to require the company to obtain stockholder approval before the board could amend the company's advance notice bylaws" in certain ways.[280]

More recently, at the beginning of the 2024 proxy season, the Oregon State Treasury put out an article pushing back against some ANB practices and advocating for what it called its "Nomination Neutrality Initiative."[281] According to Philip Larrieu, Stewardship Investment Officer at the Oregon Treasury, Nomination Neutrality stands for two basic principles: First, "externally nominated" board candidates should be evaluated with the same standard as "internally generated" candidates; and second, the incumbent board's job in reviewing nominations is to determine whether nominating shareholders have complied with basic procedural rules and not to determine whether their nominees are "suitab[le]."[282] Said another way, "[t]he proper role of advance notice provisions is to establish eligibility while it should be up to shareholders in a fair election to determine suitability."[283]

Oregon followed up this statement with action by submitting shareholder proposals to several companies asking them to adopt a policy

277 Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. Rev. 1301, 1304 (2019).

278 *See id.* at 1304–05 (discussing how, in recent times, shareholders have "actively sought to increase their voting power and influence over director elections and other important corporate matters").

279 *See supra* data analysis and discussion in Part III.

280 Schnell, Alsheimer & Iqbal, *supra* note 264.

281 Philip Larrieu, *Oregon State Treasury Nomination Neutrality*, Harv. L. Sch. F. on Corp. Governance (Feb. 26, 2024), https://corpgov.law.harvard.edu/2024/02/26/oregon-state-treasury-nomination-neutrality [https://perma.cc/ET5X-D99F].

282 *Id.*

283 *Id.*

of Nomination Neutrality.[284] Oregon's efforts have earned the applause of James McRitchie, who followed Oregon's lead by submitting several similar proposals of his own.[285] As mentioned previously, McRitchie followed these proposals with a wave of "Right to Cure" proposals.[286]

So far, ANB-related proposals are off to an uncertain start. The Oregon State Treasury was dealt a blow on February 21, 2024, when the SEC issued a no-action letter permitting Pfizer to exclude Oregon's Nomination Neutrality proposal.[287] Part of the SEC's rationale was that Oregon had failed to prove that it met the stock ownership requirements in Rule 14a-8.[288] More damagingly, the SEC also agreed that Oregon's proposal could be excluded because it was "materially false and misleading."[289] The SEC agreed with the company's reasoning that Oregon was incorrect to imply that the company's bylaws permitted the board to assess nominees' suitability.[290]

---

284 Here is the text of the Oregon Treasury's proposals: "Resolved: Shareholders of [Company Name] request the company adopt . . . a policy affirming that for purposes of SEC Rule 14a-19 (Universal Proxy), the Board's role . . . is to assess . . . eligibility, not suitability, to serve. . . . [E]ligibility shall be [determined] on substantially the same procedure, information, and basis for all nominees, regardless of source." Letter from Philip Larrieu, Inv. Officer of Stewardship, Or. State Treasury, to Corp. Sec'y, Pfizer Inc. (Nov. 16, 2023), https://www.sec.gov/files/corpfin/no-action/14a-8/operspfizer022124-14a8.pdf [https://perma.cc/SG6T-MYXV].

285 James McRitchie, LinkedIn (Feb. 26, 2024, 1:52 PM), https://www.linkedin.com/posts/james-mcritchie-a75b19_oregon-state-treasury-nomination-neutrality-activity-7167954645779173376-RBVS [https://perma.cc/D4RP-XV6B]. Here is the text of McRitchie's proposal: "Resolved: Shareholders request the Board of Directors adopt and disclose a policy stating how it will exercise its discretion to treat shareholders' nominees for board membership equitably and avoid encumbering such nominations with unnecessary administrative or evidentiary requirements." Letter from James McRitchie to Michael M. Dai, Corp. Sec'y, 3M Co. 2 (Nov. 16, 2023), https://www.sec.gov/files/corpfin/no-action/14a-8/mcritchie3m021324-14a8.pdf [https://perma.cc/L9V4-G77D].

286 McRitchie, *supra* note 270.

287 *See* Letter from Rule 14a-8 Rev. Team, Sec. & Exch. Comm'n, to Margaret M. Madden, Senior Vice President & Corp. Sec'y, Pfizer Inc. (Feb. 21, 2024), https://www.sec.gov/files/corpfin/no-action/14a-8/operspfizer022124-14a8.pdf [https://perma.cc/SG6T-MYXV] (permitting Pfizer to omit Oregon's Nomination Neutrality proposal from proxy materials distributed at its annual meeting of shareholders).

288 *See id.* (affirming Madden's finding that the Oregon State Treasury had not timely provided proof of requisite stock ownership pursuant to 17 C.F.R. § 240.14a-8(b)(1)(i) (2024), *see* Letter from Margaret M. Madden, Senior Vice President & Corp. Sec'y, Pfizer Inc., to U.S. Sec. & Exch. Comm'n 3–5 (Dec. 18, 2023), https://www.sec.gov/files/corpfin/no-action/14a-8/operspfizer022124-14a8.pdf [https://perma.cc/SG6T-MYXV] (Madden's finding)).

289 Letter from Margaret M. Madden, *supra* note 288, at 6 (underlying the SEC's finding that the Oregon State Treasury's proposal could be excluded because it was materially false and misleading in violation of 17 C.F.R. § 240.14a-9 (2024), *see* Letter from Rule 14a-8 Rev. Team, *supra* note 287 (approving of Madden's finding)).

290 *See* Letter from Rule 14a-8 Rev. Team, *supra* note 287 (affirming Madden's finding); Letter from Margaret M. Madden, *supra* note 288, at 6 (rejecting Oregon's assertion implying that the Pfizer's bylaws permitted its board to assess nominees' suitability).

Several of the other proposals seem to have gained more traction. James McRitchie has written that he was "able to work out agreements at most companies" where he filed Nomination Neutrality-related proposals,[291] and at least one company has amended its bylaws to give shareholders time to cure deficiencies.[292] It will be interesting to see over the next few years whether this shareholder pressure will lead to widespread changes.

While the Oregon Treasury's recent campaign signals what may be the beginning of increased investor interest in ANBs, it is worth noting that the recent proliferation of complex ANBs has occurred despite the fact that ISS and Glass Lewis have had voting policies related to ANBs for years. Since at least 2020, Glass Lewis has generally recommended "vot[ing] against proposals that would require advance notice of shareholder proposals or of director nominees."[293] ISS has had an ANB policy since at least 2013.[294] ISS's policy is less strict in the sense that it formally recommends voting "case-by-case on advance notice proposals,"[295] but it goes further than Glass Lewis's in another sense by specifying the maximum deadline that it considers reasonable—sixty days before the annual meeting from 2013 to 2020 and 120 days before the previous meeting's anniversary since 2021.[296] Since almost all ANBs are adopted unilaterally by boards, these policies probably do not matter much. But ISS and Glass Lewis both also have policies that sometimes recommend voting against some directors when the board has taken action to limit shareholder rights without shareholder approval.[297] I am not aware of any cases in which ISS or Glass Lewis has recommended voting against directors because they adopted tough ANBs, but it is possible that they may begin to do so given the recent attention on the subject.

---

291 McRitchie, *supra* note 270.

292 *See, e.g.*, Costco Wholesale Corp., Current Report (Form 8-K) (Sept. 16, 2024), https://www.sec.gov/Archives/edgar/data/909832/000090983224000039/cost-20240916.htm [https://perma.cc/43X5-D4NH] (amending Costco's bylaws to allow shareholders to cure deficiencies in their nominations).

293 2020 Glass Lewis Guidelines, *supra* note 199, at 48 (explaining Glass Lewis's recommendation against certain procedures).

294 *See* 2013 ISS Guidelines, *supra* note 200, at 23 (ISS's Advance Notice Requirements for Shareholder Proposals/Nominations).

295 2024 ISS Guidelines, *supra* note 24, at 27.

296 *See* sources cited *supra* notes 200–01.

297 *See* 2024 ISS Guidelines, *supra* note 24, at 15 (ISS's Problematic Governance Structures); 2024 Glass Lewis Guidelines, *supra* note 24, at 28 (recommending against voting for board proposals that limit important shareholder rights).

Conclusion

This paper analyzes the latest legal defensive innovations used by boards in their high-stakes battles with activist hedge funds, touching on theory, empirical evidence, and policy. Data from more than 14,000 sets of corporate bylaws over the past twenty years show that ANBs have transformed over time. Nomination deadlines have by and large converged to a single market standard, but disclosure requirements have not. To the contrary, disclosure requirements vary widely across firms, are continually evolving, and show little evidence of moving toward convergence.

ANB drafting practice appears to have shifted market-wide in response to two significant shocks: a wave of activism around the Great Financial Crisis and the SEC's adoption of Universal Proxy rules. At the firm level, the ANB revolution has been led by large firms. Firms also tend to amend their disclosure requirements when they are targeted by an activist if, prior to being targeted, their disclosure requirements were relatively light.

Overall, these shifts in ANB practice should be expected to significantly impact corporate governance. This is because (1) longer and more complex requirements increase the cost of running a proxy fight and thereby reduce board accountability, and (2) complex requirements and high levels of variation across firms make it more difficult for investors to evaluate companies' ANBs and voice their preferences about them. On the flip side, however, modern ANB practice may also benefit shareholders and other corporate stakeholders by allowing boards to filter out destructive or unsophisticated activists.

Courts and policymakers should carefully consider adopting reforms or changing legal rules to reduce boards' incentives to adopt unnecessarily sprawling and complex disclosure requirements. But in doing so, they should avoid stripping boards of their ability to maintain orderly elections or inadvertently increasing the amount of destructive or unsophisticated activism. Additionally, institutional investors should consider engaging with boards about their advance notice requirements to ensure that investors' rights and their beneficiaries' interests are protected.

Appendix

Article Extraction Procedure

In the vast majority of cases, companies place their advance notice provisions in a bylaw article that contains provisions related to shareholders generally or shareholder meetings. To identify and extract this article from each set of bylaws, I used the following procedure:

1. Locate the start and end position of each article heading within the bylaws by identifying all case-insensitive matches with a regular expression that begins with the following string: "`(ARTICLE|Article)[:space:][IVX[:digit:]]+[[:digit:][:space:][:punct:]]*`."
   The regular expression ends with 234 article headings I collected by hand from my bylaw corpus, arranged in the following format: "`(TITLE 1|TITLE 2|…)`"
2. Extract the text of each article heading using the positions from Step 1.
3. Identify each article heading that contains (case-insensitive) at least one of the following phrases: "Annual Meeting," "Meeting(s) of Shareholders," "Meeting(s) of Stockholders," "Meetings of Shareowners," "Meetings of the Shareholders," "Meetings of the Stockholders," "Shareholder," "Stockholder."
4. Locate the end position of each candidate article by (i) extracting the number or Roman numeral of the candidate article, (ii) identifying the subsequent article heading, and (iii) locating the end position of this subsequent heading.[298] If there is no subsequent article, use the end of the bylaw as the end position.
5. Select and extract the longest candidate chunk.[299]

One weakness of this procedure is that it can only extract the relevant article for bylaws that actually use the word "Article" plus a number or Roman numeral to mark article breaks. For the minority of bylaws that are not drafted this way, I was not able to extract the relevant article. I excluded these bylaws from my subsequent analysis.[300]

---

298 I included the entirety of the subsequent heading in the extracted text so that I could visually check to ensure that the extraction procedure was working properly.

299 In most cases, I found only one candidate article. In the small number of cases with multiple candidates, I chose to extract the longest candidate article after reviewing cases with multiple candidates and observing that the longest candidate was often (if not always) the correct article.

300 Most firms use the same format for drafting their bylaws over time, so this mostly meant that some firms were dropped from my analysis. I was originally able to pull bylaw text for 4,354 firms from the SEC's website that met my other screening criteria, but 506 (11.6%) of these firms had no extractable ANB articles (usually because they did not use the word "Article" plus a number or Roman numeral), so I dropped them, leaving my sample of 3,848 firms.

I extracted the relevant article for each set of bylaws in order to increase the accuracy of my various measures of bylaw strength. For example, if I had used the entire set of bylaws to calculate my *Strength* measure, then I would have identified more false positive cases in which I matched a keyword that did not occur in the ANB but instead occurred elsewhere in the bylaws. Similarly, my *Word Count* measure would have varied with the length of other (irrelevant) bylaw provisions. I did not, however, attempt to extract just the advance notice provisions from each set of bylaws, because some companies split their advance notice provisions up over several sections within the relevant article. It would thus have been much more difficult to ensure that I was collecting all of the relevant text.

As an additional step toward increasing the accuracy of my measures, I deleted from each relevant article the provision containing the proxy access requirements, if there was such a provision. Companies with proxy access often place their proxy access requirements alongside their advance notice provisions, and proxy access provisions contain a lot of the same types of disclosure requirements as advance notice provisions. They can also be quite lengthy. Thus, it was crucial that I remove the proxy access provisions to ensure that my bylaw *Strength* and *Word Count* measures were comparable for firms with and without proxy access.

To remove the proxy access provisions, I followed a similar procedure to the one outlined above, but with a few minor adjustments. First, instead of searching for article breaks, I searched for section breaks. Second, I used different candidate headings.[301] And third, due to firms' use of more complicated numbering schemes, I did not use the number of each candidate section to identify the subsequent section. Instead, I simply used the first section after the candidate section.

Procedure for Supplementing Activism Data

From FactSet, I obtained a list of all campaigns announced between January 1, 2017 and December 31, 2023. I limited my sample to campaigns where a 13D was filed with the SEC or the activist announced its intention to run a proxy fight. I also included only campaigns launched by activists that (1) were identified by FactSet as hedge funds, (2) could be matched to activists in Professor Brav's 1994–2016 event sample, or (3) I was able

[301] I used the following regular expressions: "Proxy Access for Director Nominations," "Inclusion of (Stock|Share)holder Director Nominations in the (Corporation|Company)[:punct:]?s Proxy Materials," "Proxy Access," "(Stock|Share)holder Nominations Included in the (Corporation|Company)[:punct:]?s Proxy Materials," "Inclusion of Director Nominations by (Stock|Share)holders in the (Corporation|Company)[:punct:]?s Proxy Materials," and "Inclusion of (Stock|Share)holder Nominees in the (Corporation|Company)[:punct:]?s Proxy Materials".

to identify as hedge funds through internet searches or reviewing Form ADV filings on the SEC's Investment Adviser Public Disclosure website.[302] I defined a campaign's start date as the 13D filing date if one was available and the date on which a proxy fight was announced otherwise.

To this list of FactSet events, I added additional 13D filings collected from the SEC's website. I downloaded from the SEC's EDGAR database all Schedule 13D filings made at firms in my bylaw sample. Following Professor Alon Brav and his co-authors, I sought to exclude 13D filings related to merger arbitrage and bankruptcy. To do so, I dropped all 13D filings that mentioned "merger agreement" or "chapter 11" in their Item 4 statement of purpose. Then, I further dropped all filings not made by an entity I could identify as a hedge fund. I identified hedge funds by matching entity names to (1) activists listed in Professor Brav's data, (2) hedge funds listed in the FactSet data, and (3) hedge funds I identified by manually searching through internet sources and Form ADV filings.

Here is a list of hedge funds I identified manually based on my review of the FactSet data and 13D filings:

1. Caligan Partners LP
2. Blackwells Capital LLC
3. Ides Capital Management LP
4. Politan Capital Management LP
5. Gilead Capital LP
6. Kimmeridge Energy Management Co., LLC
7. Outerbridge Capital Management LLC
8. Saddle Point Management LP
9. Scott Klarquist (and his fund, Seven Corners Capital)
10. Vesa Equity Investment SARL
11. Cruiser Capital Advisors LLC
12. Engine No. 1 LLC
13. Alta Fox Capital Management
14. Galloway Capital Partners LLC
15. Gatemore Capital Management LLP
16. Railroad Ranch Capital Management LP
17. The Donerail Group LP
18. Velan Capital Investment Management LP
19. White Hat Capital Partners LP
20. Whitefort Capital Management LP
21. Activist Investing LLC

302 *Investment Adviser Public Disclosure*, SEC. & EXCH. COMM'N, https://adviserinfo.sec.gov [https://perma.cc/M8CD-T2FT]. Form ADV is the basic reporting form for hedge funds registered with the SEC. For more information, see generally *Form ADV*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/form-adv [https://perma.cc/WZP6-XQB2].

22. Alesia Asset Management LLC
23. ATG Capital Management LLC
24. Carlson Ridge Capital LLC
25. Cedar Creek Partners
26. Eriksen Capital Management LLC
27. District 2 Capital LP
28. Findell Capital Management LLC
29. Forager Capital Management LLC
30. Global Value Investment Corp.
31. GrizzlyRock Capital LLC
32. Irenic Capital Management LP
33. Lemelson Capital Management LLC
34. Misada Capital Flagship Fund LP
35. PrimeStone Capital LLP
36. Repertoire Partners LP
37. Sophis Investments LLC
38. Union Square Park Capital Management LLC
39. Zenith Sterling Advisers LLC
40. Windward Management LP
41. TLS Advisors LLC
42. Talanta Investment Group LLC
43. SevenSaoi Capital LLC
44. Sententia Capital Management LLC
45. SCW Capital Management LP
46. RPD Fund Management LLC
47. Riposte Capital LLC
48. Plaisance Capital LLC
49. MFN Partners Management LP
50. Lynrock Lake Partners LLC
51. Lakeview Investment Group & Trading Co. LLC
52. Hutch Capital Management LLC
53. Horton Capital Management LLC
54. Hill Country Asset Management LP
55. Hale Partnership Capital Management LLC
56. Goldenwise Capital Group, Ltd.
57. Ewing Morris & Co. Investment Partners Ltd.
58. Erez Asset Management LLC
59. Driver Management Co. LLC
60. Delta Value Group, LLC
61. D1 Capital Partners LP
62. Creative Value Capital Limited Partnership
63. Cove Street Capital LLC
64. Corbin Capital Partners LP

65. Community US Fund Management, Inc.
66. Chain of Lakes Investment Fund LLC
67. Cable Car Capital LLC
68. Bleichroeder LP
69. Black Diamond Capital Management LLC
70. Bigger Capital Fund LP
71. Baines Creek Capital LLC
72. Azurite Management LLC
73. Arkhouse Partners LLC
74. Apis Capital Management
75. 325 Capital LLC
76. Discovery Capital Management LLC
77. Kanen Wealth Management LLC
78. Goudy Park Management LLC
79. 180 Degree Capital Corp.
80. Sansone Capital Management LLC
81. Abdiel Capital Advisors, LP
82. Indus Capital Partners LLC
83. Brennan Asset Management LLC
84. Esplanade Capital LLC
85. Paloma Partners Management Company
86. Park West Asset Management LLC
87. Trinad Capital Management LLC
88. KLS Diversified Asset Management LP
89. Shannon River Fund Management LLC
90. Argyle Street Management Limited
91. Whale Rock Capital Management LLC
92. Arosa Capital Management LP
93. Pzena Investment Management LLC
94. CF Partners Capital Management LP
95. Spruce House Capital LLC
96. Divisar Capital Management LLC
97. Ouray Fund Management LLC
98. Accretive Capital Partners LLC
99. 22NW LP
100. Antara Capital LP
101. DH Partners LLC
102. Greenhaven Road Investment Management LP
103. Arles Management Inc.
104. Rosalind Advisors Inc.
105. Barna Capital Group Ltd.
106. Value Capital Partners Pty Ltd.
107. Highbridge Capital Management LLC

108. MG Capital Management Ltd.
109. Masters Capital Management LLC
110. Glazer Capital LLC
111. Global Value Investment Corp.
112. HMI Capital Management LP
113. Matthews Lane Capital Partners LLC
114. Summers Value Partners LLC
115. Acuta Capital Partners LLC
116. Praetorian Capital Fund LLC
117. Glendon Capital Management LP
118. Punch & Associates Investment Management Inc.
119. Fund 1 Investments LLC
120. Farallon Capital Management LLC
121. First Light Asset Management LLC
122. 10,000 Days Capital Management
123. Gate City Capital Management LLC

Regular Expressions to Match Provisions

Here is a list of the regular expressions I used in my R code to match the sixteen ANB provisions I track in my empirical analysis and to identify bylaws with proxy access provisions:

1. AAUs – "`(A|a)rrangement.+(U|u)nderstanding`"
2. Affiliates – "`(A|a)ffiliate`"
3. Associates – "`(A|a)ssociate[^d]`"
4. Acting in Concert – "`(A|a)cting in (C|c)oncert`"
5. Competitors – "`(C|c)ompetitor`"
6. Derivatives – "`(D|d)erivative`"
7. Family – "`(F|f)amily`"
8. Known Supporters – "`known by.+to support`"
9. Performance Fees – "`(P|p)erformance([:punct:]|[:space:])?((R|r)elated|(B|b)ased)?[:space:](F|f)ees`"
10. Questionnaire – "`(Q|q)uestionnaire`"
11. Regulation S-K Item 404 – "`404`"
12. Schedule 13D – "`(Rule 13d-1|Schedule 13D)`"
13. Interview – "`(I|i)nterview`"
14. UPC – "`14a[:punct:]19`"
15. Anniversary – "`((A|a)nniversary|((previous|prior|preceding)[:space:](annual|meeting|year)))`"[303]

[303] Here I searched within a smaller fragment of the relevant bylaw article, which I extracted with the following regular expression: "`(T|t)o be timely[[:alnum:][:punct:][:space:]]{1,50}?(N|n)otice.+?no(t)?[:space:](less|later|fewer)[:space:]than.+?([:digit:]{2,3}|forty.fi(ve|fth)|seventy.fi(ve|fth)|`

16. Proxy Anchor – "`(P|p)roxy`"[304]
17. Proxy Access – "`(P|p)roxy (A|a)ccess`"

Variable Definitions

Variable	Definition
log_mcap	The logarithm of firm market capitalization. Market cap is calculated as price times shares outstanding at the end of each calendar year using data from CRSP. I added shares outstanding across different share classes for firms (*permco* in CRSP) with multiple share classes.
*log_bm**	The logarithm of firm book-to-market ratio. A firm's book-to-market ratio is the firm's equity book value (plus deferred taxes) (*ceq* + *txdbq* in Compustat) divided by its market cap at the end of each calendar year.
*roa**	A firm's return on assets. I calculate a firm's ROA during a calendar year as the firm's net income before extraordinary items during the year (*ibq* in Compustat) divided by the firm's average total assets during the year (*atq* in Compustat).
change_roa	As used in the propensity score model, this variable is equal to a firm's ROA in the year prior to the current year minus its ROA three years prior to the current year.
ret_1yr	A firm's total stock return during the calendar year (including dividends) from CRSP.
*lev**	A firm's net debt-to-assets ratio (a measure of leverage). It is calculated as the firm's long-term debt (*dlttq*) plus its current portion of long-term debt (*dlcq*) minus its cash and cash equivalents (*che*), all divided by the firm's year-end assets (*atq*). All of the variables are from Compustat.
div	An indicator equal to 1, if the firm paid a dividend in the calendar year, and 0 otherwise.
log_age	The logarithm of firm age in years plus 1. (I add one because the logarithm of 0 is negative infinity.) Firm age is calculated in each calendar year as the difference between the calendar year and the year of the earliest link start date (*linkdt*) for each firm (*gvkey*) in the CRSP-Compustat link file.
*rnd**	A firm's total R&D spending in the calendar year (*xrdq*, summed across quarters) divided by the firm's year-end total assets (*atq*). Missing values are replaced with 0. All of the variables are from Compustat.

*NOTE: All variables marked with * are winsorized at 1% and 99% to reduce the impact of outliers.*

`thirt(y|i)|fift(y|i)|sixt(y|i)|sevent(y|i)|eight(y|i)|ninet(y|i)|one.hundred twent(y|i)|one.hundred fift(y|i)|one.hundred sixt(y|i)|one.hundred eight(y|i)|one.hundred).+?([:digit:]{2,3}|forty.fi(ve|fth)|seventy.fi(ve|fth)|thirt(y|i)|fift(y|i)|sixt(y|i)|sevent(y|i)|eight(y|i)|ninet(y|i)|one.hundred twent(y|i)|one.hundred fift(y|i)|one.hundred sixt(y|i)|one.hundred eight(y|i)|one.hundred)?.*?(Meeting|meeting|Proxy|proxy).*?(\\.|;)`"

[304] Here I also searched within the smaller fragment described in the previous footnote.

Evaluating the Accuracy of the Machine-Coding Procedure

To evaluate the accuracy of my procedure for coding ANB provisions, I hand-coded a randomly selected sample of 100 bylaws. Table 3 below shows the rate of agreement between the machine coding and my hand coding for the bylaw sample. The table shows that, for each of the individual provisions I track (from "Proxy Access" to "Anniversary"), the machine coding matched my hand coding in more than 90% of sampled bylaws.

TABLE 3. AGREEMENT BETWEEN HAND-CODED AND MACHINE-CODED SAMPLES

Provision	Match Rate
proxy_access	0.95
aic	0.94
competitor	0.96
known_supporter	0.98
derivative	0.97
affiliate	0.93
associate	0.95
family	0.98
questionnaire	0.93
aau	0.92
performance_fees	0.98
sk_404	0.94
sch_13d	0.93
upc	0.99
interview	1.00
deadline	0.90
proxy_anchor	0.96
anniversary	0.94
strength	0.74
word_count	0.00

A few caveats are worth noting. First, for the provisions related to the nomination window ("Deadline," "Proxy Anchor," and "Anniversary"), the match rate is measured only for bylaws where the machine-coding procedure was able to extract a deadline. In other words, the machine coding matched my hand coding in 90% of sample bylaws where the machine coding picked out a deadline. But the machine-coding

procedure failed to extract a deadline in thirty-two of the 100 sample bylaws. Of these thirty-two sets of bylaws, I confirmed that eighteen did not have any nomination-related advance notice provisions. That means that the machine-coding procedure failed to extract a deadline from fourteen bylaws that actually had one. If I were to include these fourteen bylaws in the accuracy calculation, then the "deadline" match rate declines to 74%. The accuracy rates for "proxy anchor" and "anniversary" would decline by a similar amount.

Second, as I worked on the hand coding, I realized that I could substantially improve my machine-coding procedure for collecting information related to the nomination window (other than the deadline). The match rates in Table 3, all of the analyses in the paper, and the data collection procedure described in the Appendix reflect the improved machine-coding process. Before I implemented this improved procedure, the match rates for "proxy anchor" and "anniversary" were only 93% and 85% respectively.

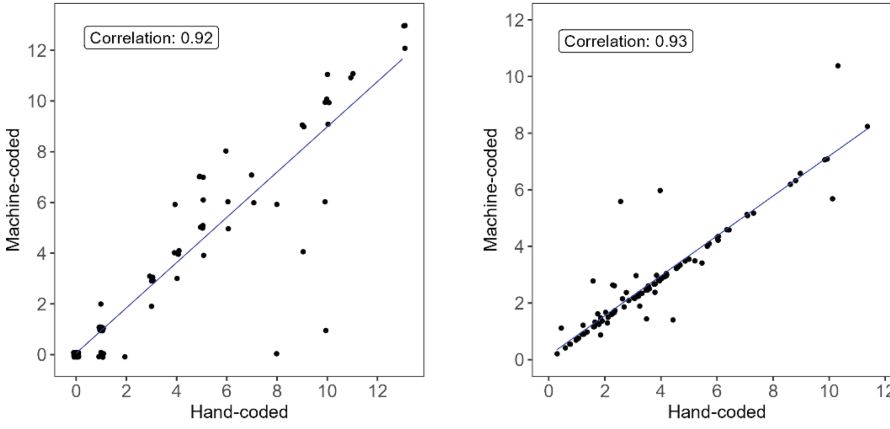
Table 3 also shows that the match rates for the key ANB strength variables (*Strength* and *Word Count*) are much lower than the match rates for the individual provisions. The *Strength* match rate is lower because *Strength* aggregates the coding of thirteen component provisions. Errors in any of those provisions lead to inconsistencies in the *Strength* variable. Additionally, *Word Count* showed no perfect agreement because the machine-coding procedure calculated word count after preprocessing the text (e.g., by removing punctuation and numbers). When I hand-coded the bylaws, however, instead of duplicating this preprocessing by hand, I simply copied and pasted the text of the relevant bylaw article into an online word counter utility[305] and removed any proxy access-related provisions.

A better way to judge the accuracy of these two summary measures is to observe the correlation between the hand-coded strength scores and the machine-coded scores. Figure 9 below plots the scores against each other for both measures and displays their respective correlations.[306]

[305] WordCounter, https://wordcounter.net [https://perma.cc/9A5C-Y3Q6].

[306] Because there are so many overlapping points in the *Strength* panel, I've added a small amount of noise to the data points so more of the data points are visible.

FIGURE 9. AGREEMENT BETWEEN HAND-CODED AND MACHINE-CODED SAMPLES



(a) Strength (b) Word Count (thousands)

Figure 9 shows that my hand-coded measures and the machine-coded measures are highly correlated for both proxies for ANB strength. For *Strength*, the largest errors in the sample occur in instances where the advance notice bylaw provisions were not placed in the bylaw article related to stockholder meetings but were instead placed in a different article. In these few cases, the machine extraction procedure underestimated *Strength*.

The fact that my machine-coding procedure adds noise to my proxies for ANB strength does not invalidate my empirical results. However, the noise does likely reduce the precision of the event study estimates. Additionally, if I am systematically undercounting the advance notice provisions for a small number of companies' bylaws, then my event studies may underestimate companies' responses to activism by missing some amendments. It is also possible that my event study estimates overestimate firms' response to activism (e.g., if I systematically capture amendments for "treated" firms but miss them for "control" firms), though I believe this is unlikely.

Robustness Check: Event Study with One Nearest Neighbor Matching

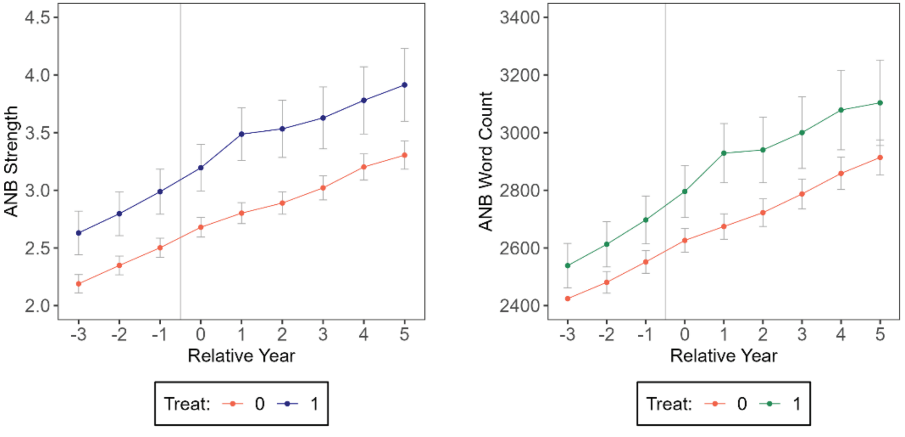
In my main analysis, I estimate the effect of being targeted by an activist hedge fund on the strength of a firm's ANB disclosure provisions by matching each targeted firm with up to five matched "control" firms. In this section, I assess the robustness of my estimation procedure by

repeating the event study analysis using only one matched control per treated firm. As before, I require the matched control firm to be in the same industry as the targeted firm (as defined by its two-digit NAICS code). Then, I select the firm with the closest estimated propensity score that was not targeted in the event window.

Figure 11, Figure 12, Table 6, and Table 7 in the additional figures and tables below present the results of using this alternative matching procedure. The estimates have a similar magnitude to the results I present in my main analysis. However, due to the smaller sample size, the results are somewhat less precisely estimated.

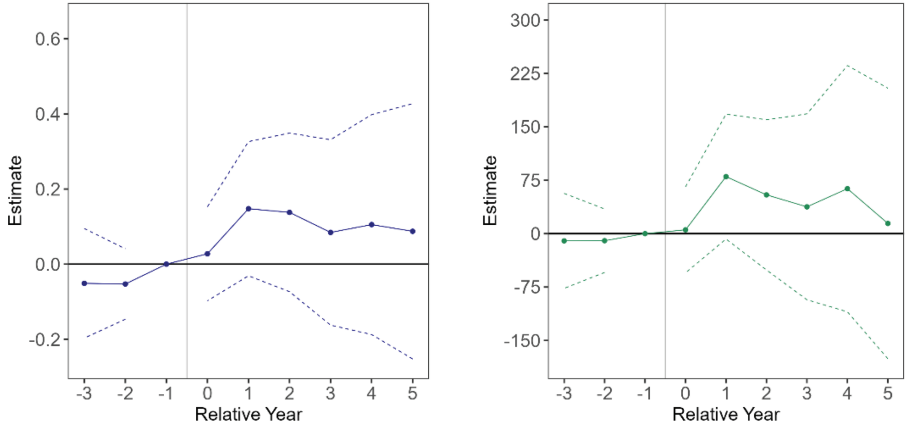
Additional Figures

FIGURE 10. EVENT STUDY RAW DATA (FIVE NEAREST NEIGHBORS)



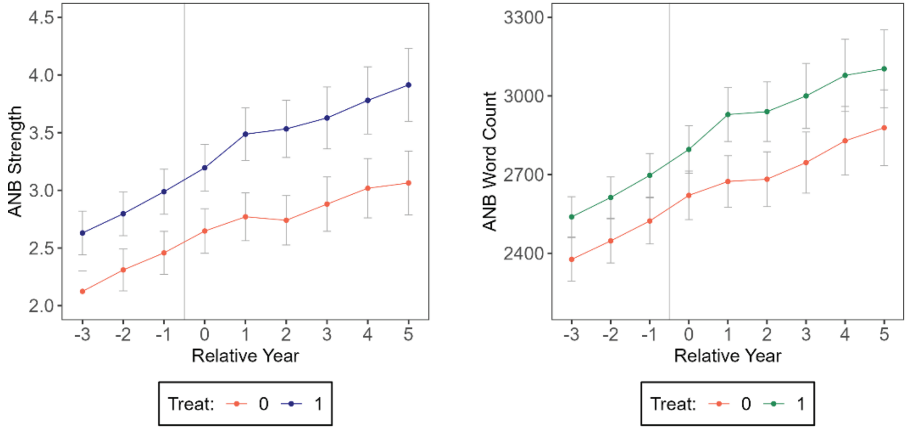
(a) Strength (b) Word Count

FIGURE 11. EFFECT OF ACTIVISM ON ANB STRENGTH (ONE NEAREST NEIGHBOR)



(a) Strength (b) Word Count

FIGURE 12. EVENT STUDY RAW DATA (ONE NEAREST NEIGHBOR)



(a) Strength (b) Word Count

Additional Tables

TABLE 4. PREDICTING ACTIVISM (LOGIT)

Dependent Variable:	$target_t$
Model:	(1)
Variables	
log_mcap_{t-1}	-0.1365***
	(0.0171)
log_bm_{t-1}	-8.31×10^{-5}
	(0.0001)
roa_{t-1}	0.4294**
	(0.1804)
$change\_roa_{t-1}$	-0.5335***
	(0.1761)
ret_1yr_{t-1}	-0.4268***
	(0.1255)
lev_{t-1}	0.0713
	(0.1111)
div_{t-1}	-0.4260***
	(0.0761)
log_age_{t-1}	0.0705
	(0.0444)
rnd_{t-1}	-0.6703*
	(0.3705)
Fixed-effects	
industry_yr	Yes
Fit statistics	
Observations	30,973
Pseudo R^2	0.06316

Clustered (cik) standard-errors in parentheses
*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

TABLE 5. COVARIATE BALANCE TESTS (FIVE NEAREST NEIGHBORS)

Variable	Treated	Control	Diff.	P-Value
log_mcap	13.213	13.233	-0.020	0.777
	(0.064)	(0.029)		
roa	-0.029	-0.026	-0.003	0.591
	(0.005)	(0.003)		
change_roa	-0.014	-0.006	-0.008	0.234
	(0.006)	(0.002)		
ret_1yr	0.031	0.036	-0.005	0.868
	(0.028)	(0.006)		
lev	0.072	0.057	0.015	0.228
	(0.012)	(0.005)		
div	0.371	0.401	-0.030*	0.077
	(0.015)	(0.007)		
rnd	0.044	0.049	-0.005	0.169
	(0.003)	(0.002)		
log_age	2.966	2.953	0.013	0.584
	(0.021)	(0.01)		
log_bm	-61.51	-52.869	-8.641	0.292
	(7.568)	(3.16)		
N	1000	4956		

*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

TABLE 6. EFFECT OF ACTIVISM ON ANB STRENGTH (ONE NEAREST NEIGHBOR)

Dependent Variables:	strength	word_count
Model:	(1)	(2)
Variables		
treat × post	0.1282	47.88
	(0.0984)	(54.84)
Fixed-effects		
cik_cohort	Yes	Yes
yr_cohort	Yes	Yes
Fit statistics		
Observations	14,472	14,472
R^2	0.85199	0.83854
Within R^2	0.00062	0.00037

Clustered (cik) standard-errors in parentheses
*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

TABLE 7. COVARIATE BALANCE TESTS (ONE NEAREST NEIGHBOR)

Variable	Treated	Control	Diff.	P-Value
log_mcap	13.213	13.155	0.058	0.525
	(0.064)	(0.066)		
roa	-0.029	-0.017	-0.012	0.117
	(0.005)	(0.006)		
change_roa	-0.014	-0.006	-0.008	0.288
	(0.006)	(0.005)		
ret_1yr	0.031	0.03	0.001	0.959
	(0.028)	(0.015)		
lev	0.072	0.075	-0.003	0.853
	(0.012)	(0.011)		
div	0.371	0.395	-0.024	0.274
	(0.015)	(0.015)		
rnd	0.044	0.043	0.001	0.893
	(0.003)	(0.003)		
log_age	2.966	2.953	0.013	0.671
	(0.021)	(0.022)		
log_bm	-61.51	-58.685	-2.825	0.790
	(7.568)	(7.405)		
N	1000	998		

*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*