

PRACTICE & TRENDS

The Second Act

Shareholder activism under the new regime

The M&A Journal

The M&A Journal is pleased to share the transcript and slides from Sidley Austin's recent seminar, "Shareholder Activism Under a New Trump Administration."

Introduction

The narrator in F. Scott Fitzgerald's short story, *My Lost City*, has long been cited as the source for the truism that there are no second acts in American lives. But the author does not let his character stop there. Mr. Fitzgerald has the narrator go on to say that he has changed his mind. He now believes that there will indeed be a second act for New York's boom days.

The narrator and his unnamed companion are somewhere in North Africa when they hear "a dull distant crash which echoed to the farthest reaches of the desert." They respond differently.

"What was that?"

"Did you hear it?"

"It was nothing."

"Do you think we ought to go home and see?"

"No—it was nothing."

The narrator shrugs off the metaphorical "crash," whereas his companion worries that a cataclysm has hit the world. She is right. The scene takes place in 1929. But he is also right. Sometimes glory days make a comeback.

As Mr. Trump returns to the White House, American voters, like Mr. Fitzgerald's two characters, are divided in their reactions to the recent election. One segment of the country fears for the future, convinced that the sound it hears is the end of world order. Another segment of the country not only dismisses the possibility of any danger but is also triumphant that their protagonist has managed to create a second act.

What does all this portend for dealmakers, corporate governance experts, shareholders and directors, the future of the world's economy?

Sidley Austin comes to our aid with a recent seminar, designed to be rigidly neutral and unassailably objective, on the effects the new administration could have on shareholder activism. To understand what may lie ahead for dealmakers as well as shareholders and C-Suiters, there could be no better guide nor a more apt subject than Sidley and its renowned

Shareholder Activism and Corporate Defense practice. The firm stands at the summit of the world's leading advisors on shareholder activism with a trophy case of awards to prove it. What's more, shareholder activism makes for an effective thermometer because it encompasses virtually all subsets of the business of M&A, from the restructuring of tax policy to the threats of a global trade war, from the role of Elon Musk to the future of ESG and the woke wars.

In the past five years, Sidley lawyers have advised clients in approximately 150 proxy contests, several hundred activist campaigns, and dozens of settlements—more than any other legal defense practice in the world, according to the firm's website. Sidley ranked No. 1 for legal company-side advisers in *Bloomberg's* Global Activism League Tables for FY 2024—both in North America and globally—topping the North America tables for the fifth year in a row. Sidley has also been ranked No. 1 in the shareholder activism defense league tables by *FactSet*, *Diligent*, and *LSEG* for company-side engagements in the past three years.

And there's more. According to the firm's website, these rankings “follow Sidley's Band 1 ranking in *Chambers USA* in “Corporate/M&A: Takeover Defense,” stating that, “Sidley Austin is the best in the business at activism defense work.” Similarly, *The Legal 500* ranked Sidley in Tier 1 for Shareholder Activism—Advice to Boards, calling Sidley's activism co-chairs Kai Liekefett and Derek Zaba “two of the best lawyers in America.”

Mr. Liekefett, Co-Chair of Shareholder Activism and Corporate Defense at Sidley and his colleagues assembled the following expert panelists for a late November discussion entitled “Shareholder Activism in a New Trump Administration”: Mary Ann Deignan, Head of Capital Markets Advisory at Lazard; Joele Frank, Co-Founder and Managing Partner of Joele Frank, Wilkinson Brimmer Katcher; Sonia Barros, Co-Chair of Sidley's Public Companies practice; and Vadim Brusser, partner in Sidley's Antitrust and Competition practice.

Soon after Sidley's discussion on the shareholder activism that may lie ahead, two important nominations emerged from the nascent administration. On December 4, the president-elect named Gail Slater as his nominee to head the FTC and two days later, he nominated Paul Atkins to lead the SEC, after the sitting chairman, Gary Gensler, had submitted his resignation effective January 20.

Mr. Atkins has many fans in both parties who say he is well-liked, level headed, with an experienced and accurate view of the mission of the SEC as the guardian against misinformation and the referee responsible for making sure capital markets remain fair and efficient. It is not, say these experts, the commission's mission to make the world a better place. That the SEC under Mr. Gensler lost sight of that is a view shared by many.

Staff members at the SEC, for example, have also long privately revealed their frustration at the chaos wrought by Mr. Gensler, using such terms as “flabbergasted,” “exhausted,” “shocked” at the constant stream of proposed regulations, truncated comment periods, and twists and turns in policy that never ceased to flow from the Commission. Mr. Gensler's oft-repeated approach, according to insiders, was to listen to both sides of a question and then decide that a proposal he favored should be adopted regardless of any criticism because, after all, it could always be dealt with later if it turned out to be ineffective or flawed in some way. It sounds reasonable enough, but experienced practitioners say that it amounted to rule-making by trial-and-error, an approach ill-suited to the U.S. economy. The stakes are too high for that, say those who welcome Mr. Atkins and his likely approach to the position.

M&A practitioners are hoping that it will not be difficult to work with the SEC during this administration and they take heart from the fact that the SEC under last the Trump administration did not turn out to be overly enamored with the activist community as expected.

Of course, corporations and public companies welcomed the unsurprising tax reductions of 2017. But beyond that unsurprising welcome, the Commission turned out to be surprisingly friendly to the targets of activists. The SEC, for example, did not take up the cause for the universal proxy card. It tightened regulations on shareholder proposals under

Section 14a-8, and proposed and adopted rules to rein in the proxy advisory firms. It is seen as likely that the Atkins SEC will follow that lead.

The panel's agenda is testament to the range of subject matter that shareholder activism encompasses, each specialty a powerful component of world business and law and each a particular focus of both the thrice-nominated Republican Party candidate and now president. The panel first examines Mr. Trump's own history as a greenmailing activist in the 1980s and then discusses the extent of support for his second administration among the activist community. It goes on to address the different reactions to the election between the equity and debt markets. Next comes a discussion of whatever tax policy might emerge from the new administration, including the possibility of powerful tariffs and whether the corporate tax breaks of his first administration will lapse, increase, or remain at the same level. Then the panel focuses on the massive deregulation of corporate America that was promised during the campaign. The future role of antitrust regulation is also a prime subject, followed by the SEC's future plans, the role of Elon Musk, and the future course of the woke wars.

Joele Frank had some advice for all those in the business world now facing a second Trump government. Don't come out from under the radar rashly, she urges, because Mr. Trump is not reluctant to use his microphone, which can often turn into the proverbial double-edged sword. Remember what she tells her clients, she says: "It is the tallest blade of grass that gets the cut."

Shareholder Activism in a New Trump Administration

Presentation Slides

Kai Liekefett: We will discuss today the consequences of the new administration for shareholder activism. This is a webinar that is strictly politically neutral and objective, and we have a fantastic panel to discuss this topic. First, we have Mary Ann Deignan who is the head of Capital Markets Advisory at Lazard, then we have Joele Frank, *the* Joele Frank, maybe the most famous PR flack in the country, from her firm, Joele Frank, named after herself. And then, I'm joined with two of my most favorite colleagues, Sonia Barros, who is the co-chair of our public companies advisory practice, and spent many years at the SEC, as well as Vadim Brusser, one of my distinguished antitrust partners.

My name is Kai Liekefett, I'm the co-chair of the Shareholder Activism and Corporate Defense practice here at Sidley. Let's dive right into it, section one, the activist investors' perspective on Trump's election. So, Mary Ann, Trump had the support of quite a few activist investors who were publicly supporting Donald Trump's campaign, both in public remarks and his contributions. From your perspective, who are the most noteworthy top activists who endorse Donald Trump?

Mary Ann Deignan: Yes, Kai, many of the largest and most prominent activists today were Trump supporters, and you've outlined some of them here on this slide, but clearly there were many, many more. And we saw them use their wallet, we saw them sponsor events and fundraisers, and in some cases even articulate what they believed was the real need for change in our country. So, not unlike what they do in their activist campaigns. A few here, some listed here, with what I will call the highest conviction, were even quite vocal and open about positioning their books for what has now become known as the Trump Trade. To be fair, I think some were a little more reserved in their support, maybe even you could call them reluctant supporters, because what they were really doing was just voicing their discontent with, let's call it the policies of the other team.

When I look at this list though, and again, with full awareness of the many others who were also supporters. We have to remind ourselves, these are investors, and they may or may not have been wearing their activist hat when they were making their endorsement choice. I think they were clearly supporting some policy promises that they believe will fuel economic growth, things like less regulation, and lower taxes, and really a change in the status quo, and in turn, they

believe that will drive a positive investing environment. So, for whatever reason, we see a list populated with these folks and others from their firms.

Mr. Liekefett: Thanks, that's very interesting, Mary Ann. I should also note that we at Sidley wrote an article a few days prior to the election, pointing out the fact that a lot of activists were rooting for Donald Trump, and interestingly, we got some feedback from other activists, whom I won't name on this podcast, out of respect, who were very quick to point out that they were actually not supporting Donald Trump (*see* Sidley on Shareholder Activism). So we should not overly generalize here, I think that's what I'm saying. Now, interestingly, and this is depicted on the second page, Donald Trump actually used to be an activist himself, and that is somewhat underreported. So, Mary Ann, what do we know about Trump's time as an activist in the 1980s?

Ms. Deignan: Interesting. But yes, you're right, Kai, Trump was a sort of activist himself. During the 80s, he, among others, I will point out, engaged in the tactic known as greenmailing. It was a perfectly legal strategy. I would say it was somewhat commonly used at the time, but in greenmailing, an activist investor quietly buys up a significant amount of their target company stock and then threatens, suggests, promises, a takeover attempt. And so, what generally happened was the companies, the targets, in an effort to make the activists go away, would make a deal to buy the stock back at a premium, with the profits accruing to the benefit of that particular investor.

So, Trump himself, was involved in this practice a number of times, including names like Holiday Inn, people remember Federated Department Stores way back when, and even at American Airlines. The American Airlines efforts on his part coincided with a pretty big market crash, led by the airlines, so that was not a winner for him. And eventually, the laws against greenmailing became a little bit stronger, and so he and others were no longer able to use this tactic.

Mr. Liekefett: Interestingly, what Congress did in the late 1980s was to adopt legislation that included a 50 percent excise tax on greenmail, and that basically put an end to this otherwise perfectly legal tactic. So, let's talk now about what the capital markets thought about Trump's election. If you can go to the next slide, you're going to see some interesting charts here. So, Mary Ann, what's your view on the capital markets' reaction here?

Ms Deignan: Yeah, so it's been quite a wild ride in the markets broadly. I think it's quite interesting to see that the debt and equity markets read this election and the election results very differently. So, we saw a very strong positive equity market reaction immediately following the results being announced, equities broadly rallied three to five percent at the news, some sectors were up much more than that, closer to 10 percent. We saw some individual stocks, things in the crypto world, for example, or Tesla specifically, trade up dramatically following these results. And the equity markets and certain stocks specifically were reacting to the promises of lower taxes and deregulation, and generally this view that there's going to be the aggressive pursuit of a very pro-business agenda by the new administration, and that really unleashed some pretty dramatic buying power, in particular in those sectors that are going to benefit from some of the new policies. So, energy for example, or financials.

But you saw a very different reaction in the debt markets. And here we saw the, let's call it the Trump Trade, work its way into the debt market even earlier in the fall. So, when the betting markets seemed to point to a certain Trump victory, you saw a real backoff in the bond market. Bonds traded off, and starting in early October, you saw, let's call it a 50-basis point increase in the ten-year yields. Now, the debt markets were reflecting and are still reflecting some fears that his policy road map might reignite inflation, and, in the long run, may not do anything to address the country's debt levels, and just overall created some concerns that we might not see the Fed continue on the rate-cutting path that markets were predicting.

Now, I want to be cautious here, it's hard to be overly precise about precisely what has been factored in to the markets from the election alone, right? We have to remember we're in earnings season still, and we are amidst a Fed easing cycle. So, both of those things are also pretty hard at work driving markets. But I think all in all the dramatic shift, the

surprising red wave, let's call it, certainly suggests speed and certainty to the changes ahead, and markets have reflected that pretty dramatically and very quickly.

Mr. Liekefett: Thank you very much. Going to the next slide, let's double click on something you said, which is Trump's tax policies. So, can you elaborate a little bit on that?

Ms Deignan: I will try to. It remains to be seen yet precisely what those tax policies will be, and what will actually be approved and on what timeline. But I have to start by saying, Kai, we don't really see tax-focused activism per se, right? In fact, I don't think I could point to a tax campaign from any particular activist, but clearly we will see a derivative effect, so to speak. The first thing that I would point out here is if there are any policies put in place or allowed to remain in place that favor hedge funds as an investment vehicle, that's probably going to be good for activism. Over 75 percent of all activist campaigns are at the hands of hedge fund activists. So, a thriving ecosystem of hedge funds is probably going to yield more activist activity. But when we look at it from a policy perspective, it could also be a tailwind that supports equity investing overall, and that on the margin also favors activism.

The devil will be in the details here though, for sure, because one would really have to look at the specific tax angle for a specific company or sector industry that's targeted by an activist. So, maybe we start to see hedge funds look into areas a little more deeply where tax policies have favored a certain kind of investment or punished a certain kind of investment and see how that may change. That could also have read through to certain capital allocation policies, but there's a lot to play out here still. So, maybe I'll stop there on that speculation.

Mr. Liekefett: Fair enough, it's early innings. Going to the next slide, another issue you raised before—Trump's promises of deregulation. So, how is that a factor for activist investors?

Ms Deignan: Yeah, I think we'll see a prominent shift in the platform of activism as deregulation starts to take hold. Broadly, this is considered a positive for smaller cap companies, and the vast majority of shareholder activism is at smaller cap companies. They don't always attract all the headlines, but it's where most of the dollars are, and it's where most of the campaign activity is. Smaller companies really do struggle, or say they struggle, with the cost of regulation. So, again, if some of those burdens related to regulation end up being lifted, that could create a much more favorable backdrop for investing in small cap companies. But I think we could also see some renewed focus on certain industries that are really going to benefit from deregulation. So, energy and financial services companies, for example, are likely to benefit from a more permissive regulatory environment.

It's difficult for an activist to take big positions in a sector that is heavily regulated. It's hard to make change when you don't really understand what specific hurdles you may face with certain regulators, and it may be difficult to decipher what's actually actionable in a space that is heavily regulated if you don't really fully understand the nuances of a particular regulatory body or environment. So, if you're an activist and you're trying to navigate the maze of regulations, it's time-consuming, it's expensive, and for many, that means there's just no interest. So, you can see where relaxing the rules in this arena may make things more interesting for activists in certain industries.

Mr. Liekefett: Yeah, no, these are great points. Look, let's just be candid, obviously a lot of companies would welcome deregulation as well, this is nothing that is just limited to activists. One final point on this topic, and if we go to the next slide we have some clips about the topic of tariffs. That, by contrast, makes at least some on Main Street, Wall Street, and corporate America, a little bit nervous. So, why don't you talk a little bit about the investment perspective on tariffs?

Ms. Deignan: Tariffs are definitely more controversial, I'll say, and certainly less clear. So, tariffs will create headwinds for firms that are reliant on imports, but they could also catalyze increased cross-border mergers and acquisitions as some companies seek to skirt the trade barriers. So, this is sort of a double-edged sword, but certainly there's a lot here that needs to be clarified. This is a topic on which I think I would remind folks that increased uncertainty, and there will be a lot of uncertainty around tariffs, is often very attractive to activists. They see the uncertainty, and in some cases the chaos,

or the shareholder frustration as an opportunity. They bring their playbook of expertise, outside perspectives, a very action-oriented approach. So, I would say the challenge really is for corporate clients, management teams, and boards to take appropriate action with respect to tariffs as it pertains to their company and their industry and take action quickly, because those who don't, I think are at increased risk for drawing an activist.

Mr. Liekefett: Mary Ann, thank you so much for your insights. Let's now move on to another topic, Trump and antitrust enforcement. And for that topic, I have my colleague Vadim here. Vadim, one of the primary issues for many investors, not limited to activist investors to be sure, is antitrust enforcement. Can you explain why that became an issue under the Biden administration?

Vadim Brusser: Yeah, thanks, Kai. So, the Biden administration has been historically aggressive on antitrust, as you all know and have experienced. There was a greater scrutiny of all transactions, including acquisitions by "big companies", including when they acquired very small players with either very limited share and in some cases no share at all, they were pipeline companies. Extra scrutiny of key industries like healthcare, technology, energy, retail, and consumer goods, even where those transactions didn't raise traditional antitrust concerns, a very aggressive focus on roll-up strategies, which really impacted private equity, and very aggressive, almost hostile statements against deals and deal-making that they viewed as problematic.

And then also a scrutiny of interlocking directorates, which is relevant to activists. And as a result, that really chilled transaction activity, and for the deals that went on, those deals took longer to clear. They also had very few reservations about bringing challenges in court, even where they knew there was a chance that they would lose, in an effort to present new theories of harm that previous administrations would not bring. They just weren't concerned about losing and they didn't have a great court record. They certainly had some great wins, but they also had some losses. And then they also introduced some major antitrust initiatives, like more aggressive merger guidelines, more burdensome HSR rules, and a ban on almost all non-competes.

Mr. Liekefett: Yeah, no, this is a very good summary of what has been going on in terms of antitrust. Thank you, Vadim. So Mary Ann, you are in many boardrooms and you have been in many boardrooms in the last four years where boards were weighing whether or not to engage in M&A. So from your perspective, the Biden administration's antitrust approach, what was the impact on M&A activity generally speaking?

Ms. Deignan: Listen, I would add a slightly different perspective to add to Vadim's comments. The last four years were also notable in that there were tremendous differences of views on price and valuation between buyers and sellers. And we have also been operating in very challenging financing markets with extremely high financing rates. I think those two things were really primary on the minds of management teams and directors when looking at M&A, and then you add in all of the uncertainty of, I should say, the current administration's policies on what kind of M&A could actually happen. You really did have those three factors all converging to create this chill, as it were. But court decisions have muted the deterrence effect of the agency's efforts, and we do anticipate the antitrust environment is going to tilt a little more positively now with a Republican administration.

Mr. Liekefett: Thank you, Mary Ann. So it's one factor, but it's not the only factor.

Ms. Deignan: Yes.

Mr. Liekefett: Very good point. Back to Vadim. The big question of course is now will Donald Trump replace Lina Khan and Jonathan Kanter? And if so, with whom? Back to you, Vadim.

Mr. Brusser: So, the answer is yes. Khan and Kanter are highly likely to be replaced. There is already a very aggressive search for candidates. As you all know, the FTC has five commissioners. Lina Khan's term as chair has expired so the new administration will be able to appoint a Republican. The leading candidates are Gail Slater. She's an advisor to JD Vance

who is very interested in antitrust policy. She's worked at the FTC, she worked for Fox Corp, Roku, and she was also a special assistant to Trump during his first administration. She's also leading his efforts to find potentially somebody at the FTC and DOJ, and she's a leading candidate.

Then, Andrew Ferguson, he's a current FTC commissioner. He's a former chief counsel to Mitch McConnell. Others include Melissa Holyoak, another current FTC commissioner, and Makan Delrahim, Associate Attorney General for antitrust at the DOJ under Trump. At the DOJ, depending on who ultimately is confirmed as attorney general, the leaders are Mark Meador, he's currently in private practice. He was an antitrust advisor to Senator Mike Lee, who's also very interested in antitrust, and then Barry Nigro and Alex Okuliar who were previous DOJ attorneys and also currently in private practice, and a professor from George Mason named Todd Zywicki. George Mason has been one of the drivers of more conservative antitrust policy.

*[*On December 6, the president-elect announced his plan to nominate Gail Slater to the top antitrust post at the Justice Department.]*

Mr. Liekefett: Very interesting. Let's see how it plays out. Of course, there's a significant chance that Trump will surprise us all with someone who wasn't on anybody's bingo card, to quote one Republican senator from a few days ago. Back to you, Mary Ann, turning to the next slide. The question is, while this is all interesting, how does this relate to shareholder activism? Why do activist investors care so much about antitrust policy?

Ms. Deignan: So great question, activists need a liquid M&A market to successfully affect a lot of their campaign strategies and promises. They're a highly transactional group of investors, and if they build a campaign thesis around either a divestiture or a full-on sell-the-company pitch, they need that threat or promise, as you may look at it, to be credible. And an active market for M&A with certainty around transaction success would be a very welcome fact to support this type of shareholder activism. Year in and year out, as we have followed campaigns, somewhere between a third and a half of all shareholder activism has some M&A-related hook. Now, recently that has dropped to more like a quarter of all campaigns, and we think that is reflective of the overall environment for M&A. So, certainly with a rebound in M&A activity, our expectation is we're going to see increased activity in this arena.

Mr. Liekefett: That makes perfect sense. Now, one final item on the antitrust topic, and this is on the next slide, is early termination. And it might sound like a nuance, but it actually does matter to activists. So, just as the backdrop here, right before the election in October, the current FTC announced new rules under the Hart-Scott-Rodino Act, as we refer to the HSR Act, including the reinstatement of the early termination program. So, Vadim, can you explain what the early termination program is and then we can talk about why this matters to activists.

Mr. Brusser: Yeah, so the HSR Act where a transaction or acquisition of shares requires a filing, there's a 30-day waiting period that has to be observed. Prior to 2021, there was an option to check a box on the form for early termination, which would give the agencies the ability to clear the transaction before 30 days. And often for many activist transactions, those were cleared within 10 days. And so, obviously that's a very important point for their timeline, and moving quickly. Now with the new HSR rules, which do require more burdensome production of materials, they will however reinstate early termination. So, it's almost a trade-off. It's something that the Republican commissioners at the FTC required and pushed for in an effort to clear the rules overall. So, this is good news for faster clearance for many deals.

Mr. Liekefett: And just to explain a little bit why that is relevant for activists, so they oftentimes apply for early termination. And the interesting nuance here is that if an activist acquires a stake in a public company and just makes the application to the enterprise authorities under the HSR Act and waits out the full 30 days, there's actually no public disclosure of the application. By contrast, if an activist applies for early termination and early termination is granted, that actually is being published on a designated website that is followed by news outlets such as Bloomberg. So, this is a dynamic we had seen before the FTC suspended the early termination program a few years ago, and we expect that dynamic to return.

Going on to the next section, the SEC under Trump, and we are moving on to another one of my favorite colleagues, Sonia Barros, who as I mentioned earlier, has spent many years at the SEC and has interesting views to share here on what to expect under a new Trump administration. If we go to the first slide of the section, let me just start by setting the stage. The SEC is very important for activist investors. After all, the SEC regulates proxy contests and activist investors oftentimes push companies to cave to their demands by using the threat of a direct election contest. And Trump has already publicly pledged to remove the current chair of the SEC Gary Gensler on day one, direct quote. So Sonia, I mean, first things first, can Trump just remove Gary Gensler on day one?

Sonia Barros: Yeah, Kai, that's a good question. Trump has been very clear about that, so let's look at how that works. So, Chair Gensler's official term as a chair commissioner of the SEC expires in June of 2026. He has a five-year term. He was appointed in mid-2021, so his five-year term is up in 2026. The SEC has five commissioners, and they each have a five-year term, and the terms are staggered, so that technically one commissioner rolls off every year. So, his term does not end until a couple years from now. So, Trump technically cannot actually fire him, but what he could do as president is he could demote him from his position as chair and designate one of the current sitting Republican commissioners, such as Commissioner Peirce or Uyeda as the SEC chair. So, let's be practical, right? It's all very unlikely that Chair Gensler is going to stay on and get demoted from his position as chair and just be another Democratic commissioner of the SEC.

So, he's likely to resign, and that's typically what we've seen. When you look at Trump's last SEC chair, Jay Clayton, he resigned in December 2020 in advance of President Biden's inauguration. When you go back years before, Obama appointee chair Mary Jo White had also resigned in advance of President Trump's inauguration, and Bush appointee chair, Christopher Cox, had resigned in advance of Obama's inauguration. I was also just at a PLI on SEC regulation where Chair Gensler was last week, and he gave some remarks and if anything, it had a bit of a farewell tone to it. So, I think that we are likely to see Chair Gensler resign soon.

On December 4, Mr. Trump nominated former SEC Commissioner Paul Atkins to replace SEC Chair Gensler.

Mr. Liekefett: Interesting. Now, my daughter, who is nine years old, loves to play the person guessing game. So, let's do this for this topic. Who will become the next SEC chair? And of course you have at least a 50 percent chance of being totally wrong, Sonia, but I'll still make you go through the candidates. Here you go.

Ms. Barros: Yeah, I mean, look, it's always hard to predict who the next SEC chair is going to be. I mean, these names that you have on the slide are all names that I've heard, and have been mentioned in media sources. I've also heard some other names such as Brad Bondi. He's currently in private practice and he previously worked at the commission as counsel to one of the former Republican commissioners. Bob Stebbins is also a name that's been mentioned. He was previously general counsel of the SEC under Chair Jay Clayton. What is definitely for sure is that whoever the next SEC chair is going to be, it's going to be someone that is pro-business, pro-capital formation, and also pro-crypto.

Mr. Liekefett: Well, that makes perfect sense. So let's talk about the last Trump administration because I think we are always trying to understand what is going to happen by looking at history. So let's look at the SEC under the first Trump presidency. We're going to discuss three topics. The first one is the universal proxy card. Just taking a step back here, when we looked at what the first Trump administration did at the SEC, we actually found that the first Trump administration was certainly more company friendly than activist friendly.

And I think the universal proxy card is the perfect example for this. It was actually originally introduced under Obama's SEC, and then it appeared at least to outsiders that the Trump SEC did not really review it and consider it. But ultimately, the universal proxy rules were adopted against significant objections from company lobbyists and law firms, including our firm, by the Biden SEC. So can you maybe share your views, Sonia, on what the Trump SEC thought of the universal proxy rules? And then, I guess the big question is, will the Trump SEC in the next administration try to either rescind or revise universal proxy rules?

Ms. Barros: Yeah, so you mentioned that it was originally proposed under Obama's SEC, and then the Trump SEC ignored it, and that is the chair's prerogative, right, to set their own regulatory agenda at the SEC. Just because the prior leadership had proposed something, it doesn't mean that the new leadership needs to see that through to any kind of final rules. So, universal proxy was adopted under the Biden SEC, under Chair Gensler. And you may recall that Republican Commissioner Hearst actually voted against the rule. She was concerned that the entry point for dissident nominees on the universal proxy card was too low, right, and she had expressly stated that she would've been in favor, perhaps in favor, of the rule if there was some kind of stock ownership requirement for a dissident to have access on the company's proxy card. And that was something that Sidley supported, right, with its recommendation.

She even cited Sidley's letter in her dissent speech, but we had recommended continuous ownership of three percent of the company's total voting power for at least three years. So, is the Trump SEC chair going to undo this rule? It's not so easy for the SEC to undo rules that have been adopted with proper notice and comment. So in order for the SEC to undo the rule, what they would have to do is propose a new rule that's different and then undergo a notice and comment period. And this could take months or even years to get through. So, this is a time-consuming process, and the SEC may have more limited resources under the Trump administration. They're going to have to decide if this kind of rulemaking undoing universal proxy is on the top of their list because that's going to take more time. But something that they could easily do is direct the SEC staff to take initiatives that interpret the rule in a manner that's more favorable to companies. That's an easy thing they could do.

Mr. Liekefett: Interesting. Well, there's also the fact that activists were popping champagne when the universal proxy rules were adopted under the Biden administration. And let's not forget there are a lot of activists in the orbit of Donald Trump who may or may not try to influence him to not touch the rules.

Ms. Barros: That's right. Yeah, that would be a countervailing factor.

Mr. Liekefett: So, you mentioned the difficulty of undoing previously properly adopted rules, which is I think a perfect segue to the second topic, which is the proxy advisor regulation, which has really been a roller coaster for anybody who is interested in SEC proceedings. Just to set the stage here, in 2020, Trump's SEC adopted rules for proxy advisors that were welcomed actually by many companies, but not necessarily by activist funds. But these rules ended up in litigation in several courts almost right away, and they remain in litigation to this day. So Sonia, can you explain what's going on with these rules, and what do we expect the Trump administration to do about them?

Ms. Barros: Yeah, so you're right, Kai. This rulemaking has been very complicated because of all the litigation that's going on. There have basically been three rulemaking actions here. Two under Trump's SEC under Jay Clayton, when there was an interpretive release that the SEC issued, and then the actual 2020 rulemaking that put in new requirements for engagement between companies and proxy advisory firms. Then there was Gary Gensler's reversal of part of that rulemaking, not all of it, but I would say the most controversial part, that part that deals with engagement requirement between companies and proxy advisory firms. I will tell you that I actually worked on this rulemaking before I left the SEC, and it was a product of a very long effort at the SEC starting back in 2010 when the SEC had put out a concept release on the US proxy system. There were numerous round tables, a number of opportunities for all market participants to share their views.

And so from the staff's perspective, it wasn't really intended to be political. It was just something that was trying to address all the concerns of market participants and add what I would call this notice and awareness provision, right? This was designed to improve engagement between companies and proxy advisory firms by requiring proxy advisory firms to make their recommendations available to companies at the same time they're made available to investors, and providing a mechanism by which companies could share their views on proxy voting advice to investors before the shareholder meetings. So it was that part, that engagement part, that the SEC under Gensler reversed as part of the 2020 rulemaking. And you may recall that both of the Republican commissioners voted against these 2022 revisions citing that there was

really no reason to do this. The rules hadn't gone into effect yet. I think Hester Peirce called it regulatory whiplash, and Commissioner Uyeda called it regulatory seesaw.

And now what's happened is that both rules, both the original 2020 rule and the 2022 revision of those rules, have ended up in litigation. And the litigation is fairly complicated, but I'll just try to sum up the key takeaways. So, what's happened with the litigation this summer in June of 2024, the Fifth Circuit in a case with the National Association of Manufacturers versus the SEC, that court held that the 2022 decision, so the Gensler era of rulemaking, was arbitrary and capricious, so it invalidated that 2022 rulemaking.

However, later in the year, in September of 2024, the Sixth Circuit upheld the SEC's 2022 decision. So, now you have two conflicting decisions in the circuit. So if these rulings are appealed, this may be something that the Supreme Court takes up. And if the Supreme Court does hear this case with their current conservative majority, I would expect that the Supreme Court may support the Trump-era 2020 rulemaking, which was the one that companies favored. So what is the SEC going to do with this? So given all the litigation here and the circuit split, I would expect that the Trump SEC will wait to see how this one gets played out in the litigation and focus their resources and efforts on other rulemakings and regulatory initiatives like crypto and other pro-business initiatives.

Mr. Liekefett: Thank you very much for these insights. That has been really, really, really helpful to understand the mess that is this particular area of rulemaking. Going to the last item under the topic of Trump and the SEC, that is rule 14a-8. And as many may realize, the last Trump administration imposed strict minimum stock ownership requirements for so-called Rule 14a-8 shareholder proposals. Do you expect the next Trump SEC to revisit these rules or not?

Ms. Barros: So as I mentioned before, it's not easy to revisit rules, right? You have to go through a long process. You have to propose new rules and go through the notice and comment period. It takes up a lot of staff time and resources. So I don't think we'll necessarily see a revisiting of these rules. Gensler did not attempt to undo this rule that was adopted under the Clayton SEC, but what I do think we could see is a couple things. There was a rule proposal that Gensler had put out which would further limit the ability of companies to exclude shareholder proposals. This proposal would narrow a company's ability to exclude proposals that they have already substantially implemented, are duplicative of other proposals, or are resubmissions of prior failed proposals. Both commissioners Peirce and Uyeda voted against this proposal. Now, this is just sitting out there in the proposal phase.

It hasn't gone to a final rulemaking. And so, I think it's very clear that a Trump SEC will abandon that proposal and not put it on its rulemaking agenda. So, that's kind of an easy prediction. There was another action that the SEC took that was very interesting, interesting for me in particular, having been on the staff for almost 20 years. The SEC staff put out some guidance that really impacted how shareholder proposals work with companies. It was a guidance that was referred to as Staff Legal Bulletin 14L.

And what this staff guidance did is it made it more difficult for companies to exclude shareholder proposals under the ordinary business and economic relevance exclusions. Now, this staff interpretation and guidance, this was really a significant departure from SEC staff precedent, as I had noted to *The Wall Street Journal*, and what we did see in the years after this came out was that the staff granted fewer requests to exclude shareholder proposals. So, it kind of played out how we expected it would be. And so, one thing I could see a new SEC chair doing under the Trump administration is directing the staff to rescind this guidance *Staff Legal Bulletin 14L* and go back to the SEC staff's old position on shareholder proposals. And this would not require any rulemaking, no notice and comment. So this may be an easy one for the new SEC chair to move forward with.

Mr. Liekefett: Thank you very much for your insights, Sonia. Now we come to the final topic of this webinar. And as I mentioned earlier, we have the great pleasure to have Joele Frank with us, maybe the most famous public relations advisor in corporate America. And Joele, with you, I'm going to discuss the topic of media considerations in another Trump era. And going to the first subsection of our conversation, Joele, let's talk a little bit about Trump's media and

social playbook. Obviously, Trump always knew how to influence the media. So what can we expect on this front during the next Trump presidency, Joele?

Joele Frank: During Trump One, he was not reticent to comment when he wanted to comment, and the companies learned—and if they’ve unlearned it then they’ll have to learn it again—which is that the tallest blade of grass gets cut. So one of the things that companies need to remember is that coming into the public eye or coming into a topic that is of interest to the administration or to President Trump himself, well—during Trump One meant that he would comment on it and influence it. It is not hard to stay below the radar if you need to. Often with activists, you have to do that anyway. But during Trump One, there was a lot of activity during Trump One where he commented and he would turn. He would start maybe with something positive and then he would turn to a negative. He personally, and it is personal, if he’s interested, he will say something.

Mr. Liekefett: Fascinating. One topic that obviously is on everybody’s mind right now is his relationship with Elon Musk, and the next slide shows a couple of news clips on that. What do you think will be Elon Musk’s role as it relates to Trump’s communications?

Ms. Frank: Well, Musk has his own methodology of communicating. My gut is that he has to watch where he steps because if he outshines President Trump, he will not be in favor. Yes, I think he has to watch himself, and he has very strong opinions. X has been unique in terms of the way it’s been perceived for a financial—we’re talking activism here. X has been something that is used digitally to help people get votes. I mean, during some of the proxy fights that we’ve been in recently, harnessing X for a digital campaign is not seen behind the scenes for companies. But in proxy fights, it’s done. But that’s not Musk himself personally; that’s the company. It’s a tremendous tool. Whether Musk himself can keep the visibility and the sheen when there is a president who wants it, I wonder. I personally just wonder.

Mr. Liekefett: Yeah, it’s going to be interesting to see how that’s going to play out. And I certainly am going to keep refreshing my media feed. Going to the next topic, one thing we saw a few times during his first presidency was that Trump on occasion weighed in publicly, sometimes privately, on select activist campaigns. Typically, where he had some issue with a target company in question. So, Joele, what do you think? Are we going to see this again? And if so, how should companies react when the activist is being supported by the sitting president?

Ms. Frank: Well, I think if you’re the activist, you have to go with facts. I mean, we found, during Trump One, there was a tremendous number of deals. We just at Joele Frank had over a hundred deals every year. The activists were very, very active. President Trump himself—it was usually negative for the companies where he came in. But we found that if they were able to work within the system, there were other avenues to work with. For example, one company, there was a potential activist coming at them at the SEC to say that there were purchases of stock, but there weren’t, it was just a fake thing that Trump started to come in around it, but the SEC itself stopped it. I mean, the system still works. And I mean, as I am sure Sonia can tell you, the system still is there to work.

Trump has a very loud megaphone. As I said, we have to watch, the companies are going to have to watch how far they go out. In Trump One, he was there, but he wasn’t the dominating factor. The actual facts were the dominating factor. And so the companies have to be very, very, very aware of what they’re doing. And with universal proxy, in proxy fights, there’s tremendous opportunity for the activists to get their say. But we found that with the digital work, which most companies still haven’t done, you can influence the voting tremendously. So Trump may be one place. But there are tremendous tools that didn’t exist four years ago that will now be put into effect, and we’ll see how they work. I mean, we can track who goes on to people’s websites. We can track how people vote. We can push down the bad and pull up the good. Just like Trump can overpower to some degree, everything and flood the airways, but facts are facts and they’re useful, often very useful. And that’s what we have to rely on.

Mr. Liekefett: Very good, very good. Thanks for coming to the rescue. So moving on to a different topic. What we have seen in recent years is another interesting seesaw. Everybody was focused on ESG, and there was a wave of environmental

and social shareholder proposals culminating in the proxy fight at ExxonMobil in 2021. Then we saw a backlash against ESG. Over the past summer particularly, there was a surge of anti-woke, anti-ESG and anti-DEI campaigns. Joele, can you comment on those campaigns and can we expect those campaigns to continue in a second Trump presidency?

Ms. Frank: Well, I think the campaigns are going to exist because they're going to exist. What we're telling our clients is don't go right, don't go left, go with the realities of what the facts are. You can't have quotas. Quotas aren't useful any longer. You can't use them for your goals. One of the things that we are facing is that companies are getting as many anti-woke proposals as they are woke proposals. So companies are going to have to figure out how to go down the middle in terms of what makes sense for the future. It's new. I think it's very, very new with certain shareholders putting in proposals to go woke and certain shareholders putting proposals into the anti-woke. And so we're feeling our way through this to see what makes sense for the future.

Aside from the press that Robby Starbuck is getting, he's pretty small, but aside from the press that he's getting, what makes sense for a corporation. We think that it is emotion. I mean, one of the things about woke versus anti-woke is that it is often emotional, and emotion has no place that works in the media very well for me. I mean, we say, "If it feels really, really, really, really good a 100 percent of the time, then it's a bad idea." That's just one of the things that we always tell clients. And here you've got people putting out, these are often emotional proposals. We have as many on one side as we do on the other, which I was shocked at, to be perfectly honest. I thought we would flow to stopping woke completely. But they're not stopping. The people who want it, want it. So companies are going to have to bob and weave to find what makes sense for them.

Mr. Liekefett: Yeah, that's a fascinating topic and particularly for me as a European to see how the culture wars are playing out in corporate America, of all places. Also interesting, and this is depicted on the next slide, is that we have the ESG backlash in terms of Robby Starbuck and other anti-ESG warriors, and now we have the backlash to the backlash from both politicians and other constituencies. So what are you seeing in that regard, Joele?

Ms. Frank: Well, the political side of it has been muted actually, in terms of the way the corporations have been running their own organizations. Remember when we're there, there's somebody, if Robby Starbuck is there, then there may be somebody else who is counter to Robby Starbuck who wants it to go. And they may own a lot more shares than Starbuck himself. I mean, it is not all like what Exxon was facing. I mean, we found that the shareholder bases are who owns the stock. That's why I thought that the ownership discussion previously was very, very helpful and could be very, very helpful for people who are making proposals.

But we found that people with shares are really much more likely to be countered. So a corporation is going to have to publicize everything and make sure that the people who are counter to the anti-woke proposals are as visible as the people who are gaining the media's attention. But the one thing about the media is if it's not interesting, we can make it interesting. Most of the time I say we don't want to and we don't want to be there. But if there's going to be a campaign that is going to go at it one way or another, and you've got people who are against it, they'll fight it out without us. The corporation doesn't have to be the arbiter of who says what. They don't do their own. They'll be their own megaphones, and we'll count the votes.

Mr. Liekefett: Thank you very much, Joele. Your advice as usual is so important and hopefully will be heeded by a lot of companies. So we are at the end of our webinar here and to conclude what we, at least this august panel expects is that we are going to have a significant surge in shareholder activism. What we expect to see is that, and this is depicted on the next slide, that we expect activists to have influence in the White House in some form or another. We do see activists welcoming the new Trump presidency because of its tax policies, its antitrust policies. And interestingly though, we expect that the SEC under Trump may return to being more pro-company in the end. So if you will, it is a mixed bag from the perspective of companies and activists alike. But I think one thing is for certain, the next four years will not be boring. Thank you very much.

PRESENTATION SLIDES

1 of 37

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SHAREHOLDER ACTIVISM IN A NEW TRUMP ADMINISTRATION

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