NOTE

# THE RULES GOVERNING DIRECTOR ELECTION CONTESTS IN GLOBAL ACTIVISM: A U.S.-JAPAN COMPARATIVE STUDY

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*In recent years, the relationship between corporate management and shareholders has grown increasingly confrontational, driven by a surge in shareholder activism. In the U.S., the Securities and Exchange Commission (SEC) has responded with updates to shareholder communication regulations, including the Universal Proxy Rule. Meanwhile, Japan has seen a notable increase in activist campaigns, developing a proxy solicitation framework that was initially inspired by the U.S. system but has since evolved to incorporate unique local practices. This Note examines key distinctions between the U.S. and Japanese approaches to "solicitation" under proxy rules, analyzing regulatory constraints on shareholder and management actions, the role of information disclosure, and mechanisms that facilitate shareholder participation beyond voting rights. By re-evaluating these systems within the context of global corporate governance, this paper provides insights into the influence of shareholder activism on regulatory practices and offers perspectives relevant to emerging activism in jurisdictions beyond the U.S. and Japan.*

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## I. INTRODUCTION

In recent years, the relationship between corporate management and shareholders has grown more confrontational, both in the U.S. and globally.[2] "Shareholder engagement has become one of the most talked-about issues in corporate governance, and with good reason."[3]

This shift is driven by a surge in shareholder activism, with shareholders becoming more assertive in proposing

[2] *Annual Review of Shareholder Activism 2023*, LAZARD (Jan. 8, 2024), https://www.lazard.com/research-insights/annual-review-of-shareholder-activism-2023/#:~:text=Annual%20Review%20of%20Shareholder%20Activism%20%2D%202023,five%2Dyear%20averages%20by%2026%%20and%2055%%20respectively [https://perma.cc/A3R4-YSPQ].

[3] *Shareholder Engagement: Increasing Exposure in Proxy Disclosure*, EQUILAR BLOG (March 30, 2016), https://www.equilar.com/blogs/95-shareholder-engagement.html [https://perma.cc/3DSH-PM2X].

agenda items for meetings and shareholder engagement in proxy contests.[4] In response, the U.S. Securities and Exchange Commission (SEC) has updated its regulations governing shareholder communications.[5] Among these updates, the Universal Proxy Rule, stands out as the latest significant development.[6]

Recently, a more significant development is an increase in shareholder engagement activities in other regions,[7] including in Europe and Asia.[8] Notably, Japan has experienced a rapid surge in the intensity of activist campaigns in recent years,[9] which resulted in Japan being

[4] DILIGENT, PROXY SEASON REVIEW 5 (2023).

[5] *See, e.g.*, *infra* Section V.B.1. (the introduction of proxy access).

[6] *Fact Sheet: Universal Proxy Rules for Director Elections,* SEC (2021), https://www.sec.gov/files/34-93596-fact-sheet.pdf [https://perma.cc/HP2J-68A5 ].

[7] DILIGENT, *supra* note 3; Activist Insight*, Activist Investing: An Annual Review of Trends in Shareholder Activism*, at 5 (2016), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/leadership/the%20ceo%20guide%20to%20boards/the-activist-investing-annual-review-2016-260.pdf [https://perma.cc/DY7T-6AWA].

[8] *See infra* Figure A. From a global perspective, activist demands at Japanese companies consisted of more than half of the demands made at Asia-headquartered companies in 2019. Scott A. Barshay et al., *M&A Perspectives: Japan – Focus on Activism,* PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Feb. 17, 2020), https://www.paulweiss.com/practices/region/asia/publications/ma-perspectives-japan-focus-on-activism?id=30673#_edn2 [https://perma.cc/ADP8-2JX4].

[9] GEORGESON INC., GEORGESON'S 2023 JAPANESE AGM SEASON REVIEW 3 (2023) ("The 2023 AGM season in Japan saw shareholder activism take centre stage with an unprecedented level of contested shareholder resolutions. . . . The election of directors is an increasing area of focus among investors in 2023."); DILIGENT, *supra* note 3; FTI Consulting, *The Activism Vulnerability Report*, at 1 (Sept. 2023), https://www.lexology.com/library/detail.aspx?g=93f5d893-38a6-4948-9ce9-9aff11757e9b [https://perma.cc/28QD-HZM9] ("FTI Consulting's Activism and M&A Solutions team touches [...] how a culture change in Japan is igniting a surge of activism"); *id.* at 6 ("In the June 2023 Activism Vulnerability Report, our team analyzed the increasing trend of activists targeting companies in foreign markets. This trend has been particularly notable in Japan.")

characterized as "the busiest market for activism outside of the U.S."[10] While Japan's proxy solicitation regulations were initially modeled after the U.S. system,[11] the Japanese proxy regime has evolved in a unique way: coexisting with other local methods of shareholder participation in corporate governance. Consequently, several aspects of Japan's system now diverge significantly from U.S. proxy rules.

This Note embarks on a nuanced analysis of the evolving landscape of director election contests as a means for changing

One of the major reasons for Japan to experience the recent rise of activism is the prevalence of publicly traded companies with a Price-to-Book Ratio (PBR) below one (1), which in theory means it would be more beneficial to shareholders if the company were dissolved. (Among 1,837 companies listed on Prime section of the Tokyo Stock Exchange ("TSE"), roughly 50% trade at a PBR below 1x and an ROE less than 8%. Even among large-cap companies (TOPIX 500), approximately 40% exhibit the same level, falling behind their global counterparts. JAPAN CATALYST, INC., JAPAN ACTIVIST INSIGHTS 5 (Jan. 2023), https://www.japancatalyst.com/pdf/Japan-Activist-Insights_CG2022.pdf [https://perma.cc/89GR-8C3Q].

PBR, or Price-to-Book Ratio, is a financial metric comparing a company's market price to its book value, indicating how much investors are paying for each dollar of net assets. Activists target these companies, demanding actions like share buybacks, dividend increases, sales of non-core businesses, and dissolution of cross-shareholdings to improve capital efficiency. To address this matter, the TSE also released "Measures to Improve the Effectiveness of the Market Restructuring" to require companies listed in TSE to disclose their plans to improve capital efficiency, especially if their PBR is below one (that is, their shares are trading below book value). Tokyo Stock Exch., Inc., *Action to Implement Management that is Conscious of Cost of Capital and Stock Price*, JAPAN EXCH. GRP. (Mar. 31, 2023), https://www.jpx.co.jp/english/equities/follow-up/uorii50000004sse-att/uorii50000004tcv.pdf [https://perma.cc/JR4V-ZUHK].

[10] Barshay et al., *supra* note 7.

[11] *See* ATSUKO TAISHIDO ET AL., KABUNUSHI TEIAN TO ININJŌ KANYŪ [SHAREHOLDER PROPOSAL AND PROXY SOLICITATION] 154 (3rd ed. 2021).

control against the will of the board directors,[12] a domain increasingly pivotal in the sphere of corporate governance.[13]

Part II examines how the systems in the U.S. and Japan define the concept of "solicitation," which delineates the application scope of proxy rules. The current systems in both countries differ significantly, even in this most fundamental concept. Additionally, this Part presents the fundamental reasons for the significant differences in the rules governing director contests in both countries, providing a discussion that forms the basis for all subsequent Parts.

Part III examines four key proxy regulations in both countries. This Part analyzes these regulations from the perspectives of (i) constraints on the actions of the soliciting party (i.e., incumbent management and/or an insurgent shareholder), and (ii) function of information disclosure to the solicited party (i.e., fellow shareholders). Then, Part IV looks into the legal frameworks for the enforcement of such proxy regulations in both countries.

Lastly, Part V investigates the relevant legal mechanisms other than that governing the exercise of voting rights. These include (i) the means of approaching fellow shareholders (i.e., shareholder registry inspection) and (ii) the means of adding items to the agenda of the shareholder meeting (i.e., shareholder proposal). Since the shareholder voting right is realized through multiple steps governed by various rules, it is essential to review these peripheral areas.

Ultimately, this Note aims to not only offer a re-evaluation of these systems in the context of the increasing presence of shareholders in corporate governance, but this Note also aims to provide perspectives worth referencing when considering the development of activism in regions beyond the U.S. and Japan.

[12] Lucian Arye Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CAL. L. REV. 1071, 1077 (1990).

[13] DILIGENT, *supra* note 3, at 5; Georgeson, *supra* note 8, at 5–9.

## II. SCOPE OF "SOLICITATION(S)" TO WHICH RULES APPLY

This Part examines the fundamental aspects of proxy rules in the U.S. and Japan, focusing on the specific types of actions governed by these rules. The objective is to discern and articulate the similarities and differences in these systems, with a thorough analysis of the underlying causes for these variations. This examination involves analyzing the rationales for such differences from three perspectives: (i) the objectives of both proxy rules, (ii) the methods and practices of shareholder voting, and (iii) the conflicts between management and shareholders. The rationales for the differences also underlie the major regulatory and enforcement discrepancies between the proxy rules of the two countries.[14]

### *A. U.S.*

#### 1. Scope of the "Solicitation"

Shareholders of U.S. companies exercising their voting rights are limited to directly participating in the shareholders' meeting or voting through written consent.[15] However, it may be logistically difficult for shareholders located in Brookline, Massachusetts, for example, to attend the Berkshire Hathaway, Inc. annual meeting in Omaha, Nebraska. Therefore, it is common for U.S. companies with many shareholders to solicit proxies in order to hold shareholder meetings.[16] This is especially true for listed companies. Such proxy solicitations are primarily regulated by Section 14(a) of

[14] *See infra* Parts III & IV.

[15] HOLGER SPAMANN, SCOTT HIRST & GABRIEL RAUTERBERG, CORPORATIONS IN 100 PAGES 25 (3rd Ed. 2022).

[16] In order for a meeting to be validly held, there has to be a certain number of shares represented by shareholders present or voting by proxy a/k/a "quarum". By default, for Delaware corporations the quorum is met by a majority of the outstanding shares. DEL. CODE ANN. tit. 8, § 216 (2023).

the Securities Exchange Act of 1934[17] and the relevant SEC Rule (individually or collectively, "SEC Rule(s)" or "Rule(s)").[18]

Under these rules, soliciting a proxy from shareholders in listed companies[19] requires adhering to various regulations on timing, content, and filing.[20] The SEC's definition of "solicitation," which underwent several "transitions,"[21] now broadly covers communications that could potentially influence proxy voting, such as explicit proxy requests; any appeal to execute, not execute or revoke a proxy; or "[t]he furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."[22] This interpretation, particularly the broad language of "other communication" that is "reasonably calculated" to influence proxy decisions, stems from the recognition that some market players were distributing materials to influence shareholder votes before making a formal proxy request; such a maneuver bypasses federal proxy rule requirements.[23] In 2020, the SEC determined that "solicitation" covers voting recommendations by proxy advisory firms.[24]

[17] 15 U.S.C. § 78(a).

[18] 17 C.F.R. § 240.14a.

[19] § 12 of the Securities Exchange Act of 1934.

[20] *See* discussion *infra* Parts III & IV.

[21] JOHN C. COFFEE, RONALD J. GILSON & BRIAN JM QUINN, CASES AND MATERIALS ON CORPORATIONS 579 (9th ed. 2021).

[22] 17 C.F.R. § 240.14a-1(l).

[23] 17 C.F.R. § 240.14a-1(l)(1); Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 FED. REG. 66,518–66,559 (proposed Dec. 4, 2019) (to be codified at 17 C.F.R. pt. 240), https://www.federalregister.gov/documents/2019/12/04/2019-24475/amendments-to-exemptions-from-the-proxy-rules-for-proxy-voting-advice [https://perma.cc/XD7K-6PN6].

[24] Press Release, SEC, SEC Adopts Rule Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate and Complete Information (July 22, 2020), https://www.sec.gov/news/press-release/2020-161. Under the amended rule, these terms apply to any "proxy voting advice" that (1) makes a recommendation to a stockholder concerning the stockholder's vote (2) on a specific matter for which stockholder

The SEC looks to whether the purpose of the communication is to influence the shareholders' decision to exercise their voting rights when determining whether an action constitutes a "solicitation."[25] In making such a determination, the following factors are considered: (i) the content of the communication; (ii) the audience to whom it is addressed; (iii) the relative timing; and (iv) the commonality of interests or the relationship, if any between the communicator and the proxy contestants.[26] If a press release regarding a merger is intended to influence the exercise of voting rights, the press release may constitute a "solicitation."[27] Another example of a potential "solicitation" includes a request of funds for activities to replace a director.[28] Whereas, if the action is merely an exchange of opinions on the evaluation of the management team, such action does not constitute a "solicitation."[29] Courts also have expanded the meaning of "solicitation."[30]

approval is solicited and (3) that is furnished by a person who (a) markets their expertise as a provision of such advice, separately from other forms of investment advice, and sells such advice for a fee. Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 34-89372, File No. S7-22-19 (July 22, 2020), https://www.sec.gov/files/rules/final/2020/34-89372.pdf [https://perma.cc/75LN-FQ5F].

[25] Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, Exchange Act Release No. 34-86721, 2019 WL 8587445, at ¶ 6 (Sep. 10, 2019). https://www.sec.gov/files/rules/interp/2019/34-86721.pdf [https://perma.cc/U45H-PV3D].

[26] Regulation of Securityholder Communications, Exchange Act Release No. 34-29315, 49 S.E.C. Docket 147, at ¶ 81, 847 (June 17, 1991).

[27] *Proxy Rules and Schedules 14A/14C*, SEC (Nov. 17, 2023), https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/proxy-rules-schedules-14a14c.

[28] Regulation of Communication Among Shareholders, Exchange Act Release No. 34- 31326, 57 Fed. Reg. 48,279 (Oct. 22, 1992).

[29] *Id*.

[30] Paul Rose & Christopher J. Walker, Center for Capital Markets Competitiveness, *Examining the SEC's Proxy Advisor Rule,* U.S. CHAMBER OF COMMERCE, at 14 (Nov. 2020), https://www.centerforcapitalmarkets.com/wp-

## 2. Exemptions from "Solicitation"

content/uploads/2020/10/CCMC_RoseWalker_v5.pdf [perma.cc/4UCW-GF5V].

For instance, in *Studebaker Corporation. v. Gittlin*, a shareholder gathered support from 42 other shareholders, which resulted in an amalgamated interest exceeding 5% of the company's stock; the shareholder subsequently requested access to the shareholder list under state law. 360 F.2d 692 (2d Cir. 1966). Defendants and the SEC argued that this action fell under Rule 14a, covering all forms of proxies and not just election-related ones. However, the Second Circuit found that the shareholder list authorizations were part of a "*continuous plan*" aimed at future proxy solicitation (emphasis supplied). *Id.* at 695–96. Therefore, Gittlin was required to comply with the proxy rules under 14a. *Id*. This is a boundary problem between what constitutes a solicitation and what constitutes lobbying (pressure campaign), the latter of which is "one of the most important weapons" for an activist. Thomas W. Briggs, *Shareholder Activism and Insurgency Under the New Proxy Rules*, 50 BUS. LAW. 99, 126 (Nov. 1994). "The principal legal question, in any case, is how to conduct such a campaign without running afoul of the proxy rules, section 13(d), or the insider trading laws" *Id*.

Another example is *Long Island Lighting Corporation v. Barbash*, in which the Second Circuit deemed print and radio advertisements criticizing the Long Island Lighting Co's management and advocating for management's replacement with a state-run entity as "solicitations" under proxy rules. 779 F2d. 793 (2nd Cir. 1985). Reversing the district court's ruling that the proxy rules cannot cover communications "appearing in publications of general circulation and that are indirectly addressed to shareholders," the Second Circuit held that the proxy rules "apply not only to direct requests to furnish, revoke or withhold proxies, but also to communications which may *indirectly* accomplish such a result or constitute a step in a chain of communications designed ultimately to accomplish such a result." (emphasis supplied) *Id.* at 795–96. According to the Second Circuit, the key inquiry to determine whether a communication is a "solicitation" is whether, in the context of the situation, the communication is "'reasonably calculated' to influence shareholder votes," even if the communication is not directly aimed at shareholders. *Id.* at 796. Rose & Walker, *supra*, at 14. The Second Circuit, however, refused to be so specific and, after concluding only that the definitional issue should be "seen in the totality of circumstances," remanded for further discovery. *Id*.

a. Exclusion from the Term "Solicitation"

Any actions that are excluded from the definition of "solicitation" are not subject to the proxy rules under the SEC Rules.31 One of the most important exceptions to the proxy rules is Rule 14a-1(l)(2)(iv), which provides that a shareholder's public announcement of how such shareholder intends to vote on any matter does not constitute a proxy solicitation. Investors frequently utilize the exemption outlined in Rule 14a-1(l)(2)(iv) when they wish to openly express their disapproval of a transaction, which requires shareholder approval, without engaging in a proxy contest.32 This exemption holds considerable importance in an election contest as well. A prominent investor's disclosure of his or her voting intentions can influence the opinions of proxy advisory firms and other investors. Consequently, the issuer or the opposition party may attempt to convince influential shareholders to openly share the influential shareholder's voting plans.33

b. Exemption Under Rule 14a-2

In addition to the discussion immediately above, there is another category of actions that are exempt from the regulations on "solicitation:" actions that fall within the definition of "solicitation" but are not subject to (i) SEC proxy rules including antifraud liability under Rule 14a-9[34] or (ii) SEC proxy rules other than those covering antifraud liability.[35]

*(1)Rule 14a-2(a)*

[31] 17 C.F.R. § 240.14a-1.

[32] Warren S. de Wied, *Proxy Contests*, THOMAS REUTERS: PRAC. L., at 8 (2020), https://www.friedfrank.com/uploads/siteFiles/Publications/Proxy%20Contests%20(6-503-6878)1.pdf [https://perma.cc/T32S-SQ6U].

[33] *Id.*

[34] 17 C.F.R. § 240.14a-2(a).

[35] *See, e.g.*, 17 C.F.R. § 240.14a-2(b).

Rule 14a-2(a) exempts solicitations "by a person in respect to securities carried in his name or in the name of his nominee" under certain conditions. This exemption applies mainly to banks and brokers, who hold securities in their own "street name," and exempts the brokers from any obligations and from antifraud liability.[36] Another example is the beneficial owner exemption.[37] This exemption is best illustrated through an example. If, after the registration date, shareholder B was assigned shares and shareholder B asked shareholder A, the previous owner of the shares, for shareholder A's proxy – shareholder B's conduct is considered to fall within this category.

*(2)Rule 14a-2(b)*

Rule 14a-2(b) provides exemptions from the proxy rules, with the exception of the antifraud liability. These exemptions can be classified into several categories: (i) solicitations made by specific individuals who are not seeking authority for proxies, (ii) solicitations targeting ten or fewer shareholders (the "Rule of Ten"), and (iii) communication in electronic shareholder forums.

*(a)Solicitations by Persons Not Seeking Proxy Authority*

Rule 14a-2(b)(1) provides an exemption for solicitations not intended to request a proxy. However, there are specific categories of individuals who cannot use this exemption. These ineligible individuals include the issuer, any nominee for election, and any Schedule 13D filer who has not disclaimed control intent.[38] In 2020, certain amendments

[36] This rule is conditioned on the advisor receiving no special remuneration for furnishing proxy voting advice. *See* 17 C.F.R. § 240.14a-2(a)(1)(i).

[37] 17 C.F.R. § 240.14a-2(a)(2).

[38] Those ineligible include (i) the issuer, its affiliates and their respective officers and directors; (ii) any nominee for election; (iii) any person being compensated by a person unable to rely on the exemption; (iv) any Schedule 13D filer who has not disclaimed

enabled proxy advisory firms to rely on Rule 14a-2(b)(1) only if certain conditions are met.[39]

This rule can be used by shareholders who want to encourage fellow shareholders to support one of the parties in a contest with minimal regulation.[40] This rule can also be used in "withhold the vote" campaigns against the election of one or more directors.[41]

### *(b)The Rule of Ten*

The exemption of solicitations of not more than ten persons can be useful to a dissident,[42] particularly where the ownership of the company is concentrated. In these cases, it may be possible and useful for an insurgent to obtain the necessary support of shareholders and "gauge the level of its support among the largest shareholders"[43] "without alerting management through any public proxy filing, and without incurring any significant expenses beyond those for long-distance telephone calls and travel."[44] This exemption has

control intent; and (v) any person with a substantial interest in the subject matter of the solicitation not shared pro rata with other holders. Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 34-89372, File No. S7-22-19, (July 22, 2020), https://www.sec.gov/files/rules/final/2020/34-89372.pdf [https://perma.cc/2SNZ-ZYHL].

[39] *Id.*

[40] de Wied, *supra* note 31, at 10.

[41] *Id*.

[42] The original purpose of the exemption, to facilitate shareholder organizational activities, has been rendered obsolete by the enactment of section 13(d) and the widespread adoption of poison pills. Briggs, *supra* note 29, 105.

[43] *Id*.

[44] *Id*. ("In the case of middle- market and smaller companies where the ownership can be fairly concentrated where the largest ten or twenty shareholders own perhaps half the outstanding shares- the insurgent's first round of telephone calls may largely determine the outcome of the entire campaign.")

been used effectively in an activist campaign.[45] Adhering to the "Rule of Ten" exemption requires that the soliciting party avoid engaging in extensive solicitation activities, such as issuing a press release or appearing in the media.

Legal guidance on how to count the ten "persons" for the "Rule of Ten" exemption is limited, as highlighted in *Crouch v. Prior*.[46] In this regard, the SEC's public interpretation is also limited.[47]

[45] For example, in 2007 a group of investors that include Oppenheimer Funds and D.E. Shaw relied on the Rule of Ten to obtain voting agreements to replace the board of Take-Two Interactive Software. *See* Gretchen Morgenson, *Funds Stopped Playing Before the Game Got Ugly*, N.Y. TIMES (Aug. 19, 2007), https://www.nytimes.com/2007/08/19/business/yourmoney/19gret.html.

[46] *Crouch v. Prior*, 905 F. Supp. 248, 256–57 (D.V.I. 1995). In *Crouch*, the court, while noting "[t]here is a dearth of precedent discussing the method of calculating whether not more than ten persons were solicited," found that a dissident stockholder had solicited more than ten persons. *Id.* More specifically, the court considered each holder of voting rights to shares as one "person" for the purpose of the ten-person limit, regardless of whether these entities represented multiple legal owners of the shares. *Id.* Separate legal owners without voting rights were not included in the ten-person count. *Id.* In contrast, the court regarded two members of the same family of investment funds, each a record holder, as two distinct individuals. Additionally, the dissident's spouse and the dissident's securities counsel, who was the trustee of the dissident's family trust, were each counted as separate persons solicited by the dissident. *Id.*

[47] Publicly available SEC staff interpretations provide the following limited guidance: a solicited person holding shares in several nominee accounts will be deemed one "person" for purposes of Rule 14a-2(b)(2); providing a form of proxy to a person in response to that person's unsolicited call based on a Schedule 13D filing and news reports is not counted against the ten-person limit; and an insurgent intending to engage in a solicitation of no more than ten persons under Rule 14a-2(b)(2) should remain mindful that its filing of a Schedule 13D—depending on the content of the document and other relevant facts and circumstances—may constitute a more widespread "general" solicitation and preclude reliance upon Rule 14a-2(b)(2). Proxy Rules and Schedules 14A/14C Compliance and Disclosure Interpretations, SEC (Nov. 17, 2023),

### *(c)Electronic Shareholder Forums*

The U.S. proxy rules were amended in 2008 to encourage the use of electronic shareholder forums (e-forum), which are essentially company-sponsored websites where information can be uploaded or exchanged to improve communication among investors or between the issuer and investors.[48] An electronic shareholder forum can effectively be used by potential activists to "test the waters" before a stockholders' meeting because the e-forum provides a platform for discussion and solicitation without the need for any SEC filing.[49]

## *B. Japan*

### 1. Scope of the "Solicitation"

When one solicits a shareholder of a Japanese company to allow oneself, or a third party, to exercise the Solicitee's voting rights, the soliciting party is required to follow the proxy rules set forth in several financial market laws: Article 194 of the Financial Instruments and Exchange Act (the "FIEA"), Article 36-2 of the Order for Enforcement of the Financial Instruments and Exchange Act (the "FIEA Order"), and the

https://www.sec.gov/corpfin/proxy-rules-schedules-14a-14c-cdi.htm#122.01.

[48] Electronic Shareholder Forums, Exchange Act Release No. 57,172, Investment Company Act Release No. 28,124, 73 Fed. Reg. 4450 (Jan. 25, 2008), https://www.sec.gov/files/rules/final/2008/34-57172.pdf [https://perma.cc/TB6U-82YB]. The exemption provided under Rule 14a-2(b)(6) permits a soliciting party, to use an electronic shareholder forum for solicitations if such solicitations are made more than 60 days in advance of the announced date of the issuer's next stockholder' meeting. Alternatively, if the meeting date is announced less than 60 days in advance of the next shareholders' meeting, solicitations can be made in the electronic shareholder forum up to two days after the solicitation announcement. *See* de Wied, *supra* note 31, at 11.

[49] *Id.*

Cabinet Office Ordinance on Solicitation of Proxy Voting for Listed Shares (the "Proxy Order").

The scope of the Japanese proxy rules is defined by "solicitation" in the same manner as the U.S. proxy rules.[50] However, unlike in the U.S., there is no detailed definition of what constitutes a "solicitation" in the FIEA or other related laws and regulations. Consequently, the specific acts that constitute a "solicitation" are determined on a case-by-case basis. In practice, certain actions that would traditionally fall outside of the definition of "solicitation" could nevertheless be considered a "solicitation" based on the relevant context. Specifically, these borderline solicitation actions include: (a) expressions of one's opinion, including criticism of the opinions of others; (b) actions encouraging the exercise of voting rights; (c) requests to not respond to another party's proxy solicitation or to withdraw a proxy; and (d) requests to agree with proposals made by oneself without issuing a proxy.[51] Generally, acts (a), (b), and (d) are not considered to be directed towards obtaining a proxy and, consequently, do not typically qualify as "solicitation."[52] Furthermore, act (c) is also not regarded as "solicitation," because interpreting the legal definition of "solicitation" to include actions aimed at preventing the exercise of proxy voting rights would be an undue extension of the language of the law.[53] Unlike the U.S.,

[50] Kinyū shōhin torihikihō [Financial Instruments and Exchange Act], Law No. 25 of 1948, art. 194 (Japan).

[51] TAISHIDO ET AL., *supra* note 10, at 154–58.

[52] *Id*.

[53] *Id*. Another point of discussion relates to the interplay between the electronic provision system for shareholders' meeting materials introduced in 2019 (a system where information such as shareholders' meeting reference documents is provided on a website instead of being mailed and is mandatory for listed companies in Japan) and the regulations on proxy solicitation. Specifically, under the electronic provision system, it is required to start providing materials electronically at least three weeks before the date of the shareholders' meeting. As part of this, it is conceivable that a notice of convocation, which includes language soliciting proxies, could be posted on the company's website. However, at this point, the notice of convocation (including the proxy form) has not typically reached

there have been few cases where the courts have considered whether an action constitutes "solicitation" within the meaning of Japanese proxy rules.[54]

2. Exemptions from "Solicitation"[55]

the shareholders, even if it has been sent. Therefore, the question arises whether posting on the website constitutes "solicitation" under proxy rules. In light of this, since there is a possibility of being considered "solicitation", to avoid such a situation, it may be advisable to adjust the content posted on the website, such as by removing language soliciting proxies at the time of initial posting, and to update the website content after the solicitation materials have actually reached the shareholders. This approach is suggested by Kunihiro Watanabe et al., *Practical Q&A on the Electronic Provision System for Shareholders' Meeting Materials*, JUNKAN SHOJI HOMU, Dec. 15, 2022, at 49 (Japan).

[54] E.g., one of the cases where there has been discussion about whether the shareholder's actions fall within "solicitation" is *MAC v. Sankyo* (which was not brought to the court). In this case, M&A Consulting Co., ("MAC"), a consulting company that provided M&A-related services, sent a letter to the over-10,000 shareholders of Sankyo Company, Limited ("Sankyo") opposing Sankyo's annual shareholders' meeting agenda item of Sankyo's joint stock transfer, which Sankyo was doing to establish a joint holding company with Daiichi Pharmaceutical Ltd. At the time, MAC was a shareholder of Sankyo. As long as such letters only express criticism of, and opposition to, the current management, this letter is not considered to constitute a request for proxy voting because (i) such actions go beyond the scope of the wording of Article 194 of the FIEA, which states that "[i]t is prohibited for any person to solicit a person to allow one's self or a third party to exercise, by proxy" and (ii) subjecting such actions to the proxy rules would result in frustrating communication between shareholders and depriving shareholders of the opportunity to exercise their voting rights in a well-informed manner. YO OTA, PRACTICAL ISSUES CONCERNING PROXY SOLICITATIONS: FOCUSING ON THE CONTEXT OF PROXY FIGHT, DOCUMENT 1, at 64–66.

[55] Kinyū shōhin torihikihō shikōrei [Order for Enforcement of the Financial Instruments and Exchange Act], Order No. 321 of 1965, art. 36-6(1), *translated in* (Japanese Law Translation [JLT DS]), https://www.japaneselawtranslation.go.jp/en/laws/view/2480/en [https://perma.cc/JSP4-9NT6] (Japan).

Article 36-6(1) of the FIEA Order provides exemptions from Japanese proxy rules: (i) a solicitation made by someone other than the issuing company or the issuing company's officers, to exercise voting rights of listed shares by proxy where the solicited persons are less than 10 persons; (ii) a proxy solicitation, made through an advertisement in a daily newspaper with information included in such advertisement being limited to a certain matters;[56] and (iii) if the person who holds listed shares in another person's name (the "Holder" and the "Holdee," respectively) makes a solicitation to exercise voting rights of the listed shares by proxy to the Holdee. In contrast to the U.S. proxy rules,[57] Japan does not categorize acts exempted from such rules into multiple categories, and actions (i) through (iii) above are not subject to any rules regarding proxy solicitation.

### *C. Analysis: Broader Scope in the U.S. and Different Backgrounds Between Both Rules*

Both regimes have the language of "solicitation" as the starting point of their proxy rules and allow case-by-case decisions when evaluating the definition. However, the systems are quite different because in the U.S., the SEC plays a role in defining the "solicitation" whereas the Japanese proxy rules are not defined by the financial markets regulator. This has led to two notable differences between the regimes. First, while the U.S. defines "solicitation" in extensive detail through the SEC's promulgation,[58] in Japan, the definition relies solely on the text of the FIEA, rendering the Japanese definition of "solicitation" more ambiguous. Second, in the U.S., the SEC has progressively broadened the interpretation of "solicitation" over time, extending the reach of the proxy

[56] *Id.* (the advertisement may only include "the name of the issuer company, the reason for the advertisement, the subject matter of the shareholders meeting, and the place where the proxy card, etc. is provided.")

[57] *See supra* Section II.A.2.

[58] COFFEE ET AL., *supra* note 20, at 579.

rules.[59] Conversely, Japan's interpretation is confined within the reasonable boundaries of the FIEA's language, resulting in a narrower application.

One of the important reasons why the Japanese proxy rules do not have detailed provisions on what constitutes a "solicitation" can be found in the initial purpose for which the Japanese proxy system was established. Japan's proxy rule, instituted in 1948, was initially designed to ensure a quorum at shareholders' meetings.[60] In contrast, the establishment of the proxy rules in the U.S in 1935 was primarily aimed at curbing abuses of proxy system by corporate management.[61]

Notably, the Japanese proxy system has experienced few amendments since its establishment. Behind this lies a significant difference between Japan and the U.S. in the way that shareholders in the two jurisdictions exercise their voting rights. The Japanese Companies Act (the "JCA") has a written ballot system that does not exist in U.S. corporate governance.[62] Historically, the general practice in Japan has been for shareholders to express their intentions either by actually attending shareholder meetings or by using this

[59] The expansion of the interpretation of "solicitation" in the U.S. is not limited to the SEC; U.S. courts have also contributed to this broadening. For further details, see *supra* note 29.

[60] SEIJI TANAKA ET AL., REVISED COMMENTARY SECURITIES TRANSACTION LAW 65–66 (1996).

[61] Exchange Act Release No. 34,378, 1935 WL 29270 (Sep. 24, 1935). In the 1930s in the U.S., proxy voting became prevalent. The regime sought to address managers who often secured shareholder support through proxies without adequate explanations or disclosures. Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 133 (1988). This led to reforms aiming at better investor information disclosure and ensuring fair corporate suffrage, allowing shareholders to guide their proxies' voting. These changes sought to empower shareholder rights and participation in corporate governance, promote company democratization, and curb managerial power abuse and persistent improper management practices. *Id.* at 140; Leila N. Sadat-Keeling, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy?* 59 TUL. L. REV. 161, 166 (1984).

[62] *See infra* Section II.D.

written ballot system (as opposed to voting through a proxy).[63] Additionally, there had been significantly fewer instances of conflict between company management and shareholders over relevant matters than in the U.S.[64] It was in the early 2000s

[63] MINISTRY OF JUSTICE, KABUNUSHI SŌKAI NO SHŌSHŪ TSŪCHI KANREN SHORUI NO DENSHI TEIKYŌ NO SOKUSHIN KAKUDAI NI MUKETA TEIGEN: KIGYŌ TO KABUNUSHI TŌSHIKA TO NO TAIWA WO SOKUSHIN SURU TAME NO SEIDO SEIBI [RECOMMENDATIONS FOR PROMOTING AND EXPANDING ELECTRONIC DISTRIBUTION OF SHAREHOLDER MEETING NOTICE DOCUMENTS – INSTITUTIONAL DEVELOPMENT TO FACILITATE DIALOGUE BETWEEN CORPORATIONS AND SHAREHOLDERS/INVESTORS] 9 (2016), https://www.moj.go.jp/content/001237432.pdf [https://perma.cc/6ZTS-9HYX] (Japan).

[64] In Japan the first proxy contest occurred in 2002, and since then, there have been "only a few" occurrences of proxy contests. *See* Masanobu Iwatani, *The Exercise of Voting Rights in Japanese Companies by Foreign Shareholders*, CAP. RSCH. J., Spring, 2003, at 2, 3 (Japan); ZENICHI SHISHIDO & SADAKAZU OSAKI, PUBLIC COMPANIES LAW 133 (2023). Since there has not been proxy material registration system, it is difficult to accurately count the number of proxy contests occurrences in Japan. *See supra* Section III.A.2.

By contrast, in the U.S., the history of proxy contests is long. For example, in 1956, a U.S. scholar argued, in the context of relationship between the proxy rules and the proxy fights, that "[i]n recent years the proxy-policing duties have assumed new importance, due largely to the increase in proxy contests and the greater use of mass media of communication to disseminate information respecting the contests." Richard W. Duesenberg, *The Proxy Rules and the Proxy Fight*, 5 BUFF. L. REV. 286, 302 (1956). Their number is significantly greater than in Japan. For instance, over the 8-year period from 2009 to 2016, the average number of proxy contests for board seats per year in the U.S. was 91.12, calculated based on the data provided by FactSet. *See 2016 Shareholder Activism Review*, FACTSET, at 12 (2017) https://insight.factset.com/hubfs/Resources/Research%20Desk/Market%20Insight/FactSet%27s%202016%20Year-End%20Activism%20Review_2.1.17.pdf [https://perma.cc/8RCH-HNDK]. The year 2023 recorded 72 incidents. *See* Holly J. Gregory, Kai H. E. Liekefett, Derek Zaba & Eric S. Goodwin, *Lessons for Directors from the First Universal Proxy Card Campaigns*, NACD (Dec. 13, 2023), https://www.nacdonline.org/all-governance/governance-resources/governance-research/outlook-and-challenges/2024-governance-outlook-projections-on-emerging-board-matters/Lessons-for-Directors-from-First-Universal-Proxy-

that Japan experienced its first proxy contest.[65] This is due to Japan-specific factors such as cross-shareholding[66] and a collective mindset among companies and investors.[67]

Therefore, modern proxy rules in Japan have been amended in furtherance of the initial purpose of the system (i.e., to ensure a quorum at a shareholder meeting) and such amendments have not sufficiently considered current corporate governance trends (i.e., the current shareholder activism and the importance of shareholders' informed decision-making).

But activism is gaining momentum in Japanese corporate practice.[68] The number of proxy contests might increase in the foreseeable future.[69] Accordingly, there will likely be an increasing number of cases where it is difficult to determine whether actions qualify as "solicitation." It is desirable to consider whether the Japanese proxy rules should be revised to have a detailed definition of "solicitation," similar to the

Card-Campaigns/ [https://perma.cc/9YP6-A23B]; *see also* Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 140–41 (2014).

[65] Iwatani, *supra* note 63, at 3.

[66] In Japan, cross-shareholding—a practice where companies and financial institutions such as banks mutually hold stocks—has been traditional, though banks' voting rights in a company are capped at 5% under the Antimonopoly Act. While individual cross-held share voting rights are limited because of such cap, their collective proportion in total listed stocks is substantial due to widespread adoption. This practice, initially lauded for strengthening business ties and preventing hostile takeovers, is increasingly scrutinized for its potential to weaken management discipline by mutually supporting existing management teams, a shift from its previously emphasized benefits during Japan's economic boom. WATARU TANAKA, COMPANIES ACT 176 (4th ed. 2023); *see also* Goto, *supra* note 63, at 128.

[67] Satoshi Izumi, *Akutibizumu: Nippon niokeru ayumi to shinka* [*Activism: History and Evolution in Japan*], WELLINGTON MGMT. (July 2023), https://www.wellington.com/jp-jp/professional/insights/activism-history-and-evolution-in-japan-jp [https://perma.cc/E96V-USCL].

[68] *See supra* Part I.

[69] JAPAN CATALYST, INC., *supra* note 8.

U.S. system, in order to clarify the scope of solicitation in the market.

### *D. Significant Difference in Voting Systems*

When comparing the proxy rules of the U.S. and Japan, it is critical to consider the entire system of exercising shareholder voting rights. Recall that, in the U.S., shareholders typically express their intentions through proxies that are issued by the company or by other shareholders.[70] In contrast, the practice in Japanese shareholder meetings is generally to hold in-person meetings where shareholders either (1) choose to attend the meeting or (2) exercise their voting rights through written voting, which includes electronic voting.[71] This written voting system is mandatory for companies with more than 1,000 shareholders eligible to vote.[72] For a listed company on the Tokyo Stock Exchange (the "TSE"), the company must adopt written voting regardless of the number of voting shareholders.[73]

This written voting process includes the company providing its shareholders with documents detailing reference

[70] As mentioned above, under the U.S. system, shareholder voting can happen in two ways, either at a shareholders' meeting or by written consent. However, many Delaware corporations amend their charters to become unable to use written consent, on the context of defense against hostile takeovers. As a result, the common way to exercise voting right is proxy. SPAMANN ET AL., *supra* note 14, at 26.

[71] Tokyo Stock Exch., Inc., *Let's Exercise Your Voting Right*, JAPAN EXCH. GRP. (Mar. 20, 2015), https://www.jpx.co.jp/learning/basics/shareholders-mtg/05.html [https://perma.cc/A79S-T429].

[72] Kaisha-hō [Companies Act], Law No. 90 of 2014, art. 298, paras. 1 and 2 (Japan).

[73] Yūka shōken jōjō kitei [TSE Securities Listing Regulations] art. 435, JAPAN EXCH. GRP. (Japan). During the period from July 2020 to June 2021, the usage rate of the written voting system in the regular shareholders' meetings of listed companies reached 98.8% among the companies that responded. *Kabunushi sōkai hakusho 2021 [Shareholders' Meeting White Paper 2021]*, 2280 SHOJI HOMU [COMMERCIAL LAW] 87 (2021) (Japan).

information for voting (the "Shareholder Reference Documents") and a form for exercising voting rights (the "Voting Form").[74] Shareholders reflect their intentions on the Voting Form and return it to the company.[75] Importantly, shareholders who meet certain criteria can make shareholder proposals,[76] and these proposals also must be included in the company's Shareholder Reference Documents and Voting Forms without the need for shareholders' direct proxy solicitation.[77] In essence, this Japanese system can be seen as granting shareholders the right to engage in activities similar to proxy solicitation at the company's expense. In contrast, in the U.S., proxy solicitation is generally necessary, at the soliciting party's expense,[78] and with stricter restrictions on shareholder proposals.[79]

Having discussed the mechanics of proxy solicitation in the two jurisdictions and Japan's written voting system, the questions remain as to why and when do Japanese shareholders engage in proxy solicitation? The written voting system, compared to a proxy, has various limitations, particularly for dissenting shareholders. Examples of such limitations include: (i) the company may impose word limits on descriptions of dissenting shareholders' proposals in the Shareholder Reference Documents (in contrast, proxy solicitation allows for an unrestricted presentation of the proposer's views in the proxy reference documents);[80] (ii) there are no legal guidelines or case law on how to handle the Voting Forms without a clear approval or disapproval (which is often

[74] See *infra* Figure B, for an example.

[75] Companies Act, art. 301, para. 1 (Japan).

[76] See *infra* Section V.B.2., for details.

[77] *Id.*

[78] *See supra* Section II.A.1.

[79] *See* discussion *infra* Section V.B.3.

[80] Kaishahō shikō kisoku [Ordinance for Enforcement of the Companies Act], Ordinance of the Ministry of Justice No. 7 of 2009, art. 93, para. 1, *translated in* (Japanese Law Translation [JLT DS]), https://www.japaneselawtranslation.go.jp/ja/laws/view/2841 [https://perma.cc/HHX5-57HB] (Japan).

the case in Japan and is a type of shareholder passivity),[81] and, in practice, the Voting Forms are often treated as favoring management proposals and opposing shareholder proposals;[82] (iii) only proxies can authorize the agent to exercise voting rights on amendments or procedural motions submitted at the shareholders' meeting; and (iv) the management can and often does express their opposition against dissenting shareholders proposals in the Voting Form and Shareholder Reference Documents during contested situations.[83]

## III. REGULATIONS ON SOLICITATION

This Part explores the differences and similarities in the key regulations of both countries' proxy rules. The analysis encompasses several critical components: (A) the architecture of the filing rules; (B) the nuances of required disclosures; (C) the dynamics of pre-filling solicitations; and (D) the Universal Proxy Rule, one of the most significant recent amendments to the SEC Rules. This Part also scrutinizes the initial impacts of (D) during the 2023 U.S. proxy season, juxtaposing these impacts against the backdrop of Japanese practices to draw comprehensive insights.

### *A. Filing of Proxy Statement and Form of Proxy*

#### 1. U.S.

"Solicitation," as defined by the proxy rules, may not be made unless a proxy statement is delivered to the Solicitee[84]

[81] *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).

[82] On the other hand, a lack of indication in a proxy is generally interpreted as leaving the decision to the agent (i.e., the Solicitor).

[83] TANAKA, *supra* note 65. See *infra* Figure B, for an example of such opposition.

[84] Hereafter, "Solicitor(s)" means the one who solicits the shareholders by proxy, while "Solicitee(s)" means the one who is solicited by Solicitor.

at the same time or prior to the solicitation.[85] Solicitors must file a preliminary proxy statement and form of proxy with the SEC except when the solicitation concerns a limited set of issues delineated by the SEC.[86] These documents must include the specific information stipulated in the SEC Rules.[87] The solicitation materials must be filed at least 10 days before sending the final version of the proxy statement to Solicitees.[88] If the Solicitor receives comments from the SEC staff on the preliminary documents, the Solicitor is required to incorporate these comments into the final version of the proxy statement and form of proxy (collectively, "U.S. Solicitation Documents").[89] Various documents designed to persuade Solicitees other than U.S. Solicitation Documents (*e.g.,* fight letters) are not subject to pre-filling to the SEC.[90] Finally, the U.S. Solicitation Documents and other additional solicitation materials, must be electronically registered using the SEC's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR"), with certain exceptions, by the day of document's distribution.[91] Once registered, these solicitation

[85] 17 C.F.R. § 240.14a-3 (2024).

[86] *See id.* § 240.14a-6 (2024).

[87] *See id.* § 240.14a-101 (2024).

[88] *Id.* § 240.14a-6(a).

[89] *Pumping Up for Proxy Season: Know You Supplements*, LATHAM & WATKINS LLP: CORP. GOVERNANCE RES. 2 (Jan. 8, 2015). https://www.lw.com/admin/upload/SiteAttachments/Pumping-Up-for-Proxy-Season-Know-Your-Supplements.pdf. *See generally* 17 C.F.R. § 240.14a-6(b). Rule 14a-4(f) prohibits the delivery of proxy cards unless the security holders have concurrently or previously received a definitive proxy statement filed with the SEC.

[90] Previously, pre-registration was required for such solicitation materials, but the 1992 amendment to SEC Rule stipulated that for solicitation materials other than the proxy statement and form of proxy, registration at the time of use was sufficient. This eliminated the need for prior review of these materials by the SEC, thereby enabling both parties in a proxy fight to respond more swiftly to each other's actions. Consequently, the content of these materials has become more aggressive. AMY L. GOODMAN, JOHN F. OLSON & LISA A. FONTENOT, A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES ¶ 10, at 10-33 to -34 (5th ed. 2013).

[91] *See* 17 C.F.R. § 240.14a-3.

materials are made available for public viewing on the Internet via EDGAR. This process ensures transparency and accessibility.

### 2. Japan

In Japan, similar to the U.S., when proxy rules apply, the Solicitor must provide the Solicitees with reference documents and a form of proxy containing certain information about the Solicitor and the proposals (collectively, "Japanese Solicitation Documents").[92] These documents must be provided either simultaneously with, or prior to, the solicitation.[93] Furthermore, once Japanese Solicitation Documents are distributed, the Solicitor must immediately submit copies to the director general of the Finance Bureau governing such proxy.[94]

### 3. Analysis: Stricter Inspection by the Public in the U.S.

Both the Japanese and U.S. systems share the requirement that Solicitors submit solicitation materials to the relevant authorities. Additionally, Solicitors in both

[92] Order for the Enforcement of the Financial Instruments and Exchange Act, ch. 7, art. 36-2 (Japan).

[93] *Id.*

[94] Order for the Enforcement of the Financial Instruments and Exchange Act, ch. 7, art. 36-3 (Japan). The Finance Bureau is a comprehensive regional economic agency rooted in the regions, performing all the duties of the Ministry of Finance except for tax-related matters, including fiscal affairs and the management of state properties. Additionally, under the delegation of the Financial Services Agency, the Finance Bureau also conducts inspections and supervision of private financial institutions in the regions. The director of the Finance Bureau serves as the head of this bureau. *Kantō zaimukyoku no gyōmu* [*The Functions of the Kanto Finance Bureau*], KANTŌ ZAIMUKYOKU [KANTO REG'L FIN. BUREAU], https://lfb.mof.go.jp/kantou/information/gyoumu.htm [https://perma.cc/98QG-WMJW].

regimes cannot conduct solicitation without distributing explanatory written materials and a form of proxy.

However, a significant difference is that, in Japan, documents submitted to regulatory authorities are not made available for public inspection.[95] It is arguable that, following the U.S. model, making all solicitation documents publicly accessible in Japan would be desirable. If all solicitation documents were accessible, it would be easier for parties involved in a proxy contest to discover violations of regulations and gather evidence for litigation. As discussed later, the effectiveness of regulatory enforcement in proxy solicitation has its limits.[96] Mutual restraint among the contesting parties might encourage them to comply with proxy rules.

### *B. Information Required to Be Furnished*

#### 1. U.S.

This Section focuses on the disclosure of information about the Solicitor, which is one of the most critical pieces of information for the Solicitees when deciding how to vote. [97]

Rule 14a-3 requires that each Solicitee in a proxy solicitation must be given a written proxy statement that complies with Schedule 14A.[98] The information that should be disclosed about the Solicitor is differentiated by (i) solicitations related to proxy contests for the appointment or

[95] Therefore, it is difficult to accurately ascertain the number of proxy contests that have occurred in Japan.

[96] *See infra* Part IV.

[97] Investors have increased their focus on voting behavior and practices of those who have a significant influence on the corporate actions and share values of issuers. Comments on Request for Comment on the Enhanced Reporting of Proxy Votes by Registered Management Investment Companies**,** Exchange Act Release Nos. 34,93169, 2021 WL 4973051, at 8 (July 11, 2022), https://www.sec.gov/comments/s7-11-21/s71121.htm.

[98] As mentioned, this proxy statement must be given concurrently with the solicitation, and no later than that. *See supra* Section III.A.1.

removal of directors,[99] and (ii) other types of solicitations.[100] In each case, when someone other than the issuing company conducts the solicitation, disclosure of the names of certain participants, in addition to the Solicitor, is necessary.[101] Also, the estimated cost of the proxy solicitation, and the name of the person bearing those costs, are among the required disclosures. Additionally, it is necessary for the Solicitor and their relevant participants to disclose their significant interests in the solicitation's subject matter.[102] More detailed information is required in the case of a director election contest situations than in other situations. The information required to be disclosed during a director election include: the number of shares owned, details of share transactions over the past two years, including the date, quantity and amount borrowed for acquisition of the shares, and contracts related to the shares.[103]

Recently, activist shareholders have leveraged equity swaps and other derivative instruments to secure considerable economic interests in a company's shares without possessing voting rights.[104] This technique can be used for proxy contests,[105] resulting in voting rights being exercised by those who lack an economic interest in the shares voted (known as "empty voting").[106] Empty voting is criticized as problematic because it limits the efficiency of the "one

[99] *See* 17 C.F.R. § 240.14a-12(c).

[100] 17 C.F.R. §§ 240.14a-3, -101.

[101] 17 C.F.R. § 240.14a-101.

[102] *Id*.

[103] *Id*. Such contracts include option contracts, put or call agreements and contracts relating to guarantees of loss or profit.

[104] WACHTELL, LIPTON, ROSEN & KATZ, TAKEOVER LAW AND PRACTICE 137 (2022), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28044.22.pdf [https://perma.cc/Y7A7-5AZ9].

[105] Henry T.C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAW. 1011, 1026 (2006).

[106] Jill E. Fisch, *Mutual Fund Stewardship and the Empty Voting Problem,* BROOK. J. CORP. FIN. & COM. L. 71, 81 (2021).

share, one vote" rule.[107] Such potential inefficiency might also extend to other voting issues associated with mutual funds[108] and dual-class voting.[109]

Facts related to empty voting are important information for shareholders when deciding how to exercise their voting rights because empty voting could further be utilized in proxy contests,[110] playing an important role in successful contests.[111] However, it is not clear whether Solicitors must disclose information regarding the fact that they or other participants use empty voting or hold a short position in the company's shares in the proxy statement.[112] Although such facts often fall within the scope of "material facts" to be disclosed under the antifraud provision,[113] proxy rules should be clearer to cover them too.[114]

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[107] *Cf.* Shaun Martin & Frank Partnoy, *Encumbered Shares*, U. ILL. L. REV. 775, 813 (2005); *see also* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006); Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625 (2008).

[108] Bernard S. Sharfman, *Mutual Fund Advisors' "Empty Voting" Raises New Governance Issues*, CLS BLUE SKY BLOG (Jul. 3, 2017), https://clsbluesky.law.columbia.edu/2017/07/03/mutual-fund-advisors-empty-voting-raises-new-governance-issues/ [https://perma.cc/8GUN-KSZG].

[109] *See* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L. J. 1453, 1459 (2019).

[110] *See* Hu & Black, *supra* note 104, at 1025.

[111] *Id.*

[112] *See, e.g.*, Letter from Jon Lukomnik, Program Dir., IRRC Inst., to Elizabeth M. Murphy, Sec'y, SEC (Oct. 19, 2020), https://www.sec.gov/comments/s7-14-10/s71410-101.pdf [https://perma.cc/7HDL-CMUF].

[113] Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 704 (2007). There are instances where the issuer stipulates in its bylaws that when shareholders exercise certain voting rights at the general meeting, they must prenotify the issuer about the details of any derivatives or short positions they hold.

[114] *Id.* at 706. *See also* SEC Concept Release on the U.S. Proxy System: Proposal Rule, Exchange Act Release No. 34,62495, 75 Fed. Reg. 42,982, 43,019 (July 22, 2010) [hereinafter Concept Release].

### 2. Japan

Under Japan's proxy rules, the scope of information required to be disclosed about a Solicitor is significantly limited. The only information that a Solicitor must report is his or her name and address.[115] However, with the increase in proxy solicitations conducted by parties other than the issuing company[116] and the diversification of shareholder attributes and forms of shareholding,[117] the interest that the Solicitor has in the proposals becomes material information for Solicitees (i.e., fellow shareholders).[118] Additionally, when parties other than the Solicitor are involved in a proxy contest, the involvement of other parties could influence the Solicitee's voting decision-making. Consequently, more detailed disclosure of information about the Solicitor and certain related parties should be made, especially in proxy contests aiming to change directors and gain control of the company.[119]

Empty voting is often discussed in Japan in the context of unwinding cross-shareholdings.[120] As discussed earlier in the context of empty voting in the U.S., it is crucial for Japan to

[115] Jōjō kabushiki no giketsuken no dairi kōshi no kanyū nikansuru naikaku furei [Cabinet Office Order on Solicitation of Proxy Voting for Listed Shares], art. 1 (Japan).

[116] *Japan Regional Brief 2024*, VANGUARD INV. STEWARDSHIP, at 3 (2024), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/japan_2023_regional_brief.pdf [https://perma.cc/T39S-YVHW].

[117] *Dai ni setsu nippon kigyō no tokuchō to sono henka* [*Section 2 Characteristics of Japanese Companies and their Changes*], NAIKAKU FU [CABINET OFF.], https://www5.cao.go.jp/j-j/wp/wp-je06/06-00202.html [https://perma.cc/RS2R-GHU5].

[118] Akira Matsushita, *Saikō: Ininjō kanyū kisei [ge]* [*Reconsideration of Proxy Solicitation Regulations [Part 2]*], 2059 JUNKAN SHOJI HOMU 50, 51. (2015).

[119] *Id.* at 51.

[120] Masakazu Shirai, *Emputi bōdingu wo meguru giron no jōkyō to sokokara erareu shisa* [*The State of Debate on Empty Voting and Its Implications*], 86 HORITSU JIHO 12, 16 (2014).

establish an appropriate disclosure system related to empty voting that currently is not required.

### *C. Solicitation Prior to Proxy Statement Distribution*

#### 1. U.S.

In the U.S., certain exceptions exist to the obligation to distribute a proxy statement.[121] Solicitors can solicit shareholders before distributing a proxy statement[122] if: (a) the solicitation materials include (i) identification information of the participants[123] and the participants' shareholding interests[124] and (ii) a legend explaining that a proxy statement will be available and expected to be read when obtained; (b) a proxy form has not been distributed to shareholders; and (c) written solicitation materials registered with the SEC in advance of their first day of use.[125] The only restriction on such pre-solicitation is the antifraud provision.[126]

This exception allows a Solicitor to conduct "unlimited solicitations" before the registration and distribution of a proxy statement.[127] If the Solicitor, pursuant to this provision, starts solicitation without distributing a proxy statement and the Solicitor subsequently decides not to continue, the Solicitor is not obligated to distribute a proxy statement to the Solicitees.[128] This means that Solicitors can first use this

[121] 17 C.F.R. § 240.14a-12.

[122] *Id.*

[123] A 'participant' is defined in Schedule 14A and typically includes a broad range of individuals directly or indirectly involved in the solicitation of proxies. *See* 17 C.F.R. § 240.14a-101 (2024).

[124] Separate registration of these details allows for referencing materials that contain this information. Regulation of Takeovers and Security Holder Communications, 64 Fed. Reg. at 61415.

[125] No later than 5:30 pm Eastern Time. *See* 17 C.F.R. § 232.13a.

[126] Briggs, *supra* note 112, at 687.

[127] *Id.* at 689–90.

[128] Regulation of Takeovers and Security Holder Communications, 64 Fed. Reg. at 61415.

provision to start solicitation with fewer costs and exert pressure on the company.[129] This exception can be seen as providing dissenting shareholders with negotiating power considering that management teams generally dislike getting involved in extensive proxy contests and given that many proposals by activist shareholders towards the issuing company are settled through negotiations before evolving into proxy contests.[130]

2. Japan

Unlike in the U.S., what Solicitors can do prior to the filing in Japan is quite limited. Solicitors cannot solicit without first distributing Japanese Solicitation Documents to the Solicitees, except in certain limited cases.[131] However, considering the importance of communication between companies and shareholders, or even communication just among shareholders in the early stage of voting decision making, Japan should consider adopting regulations similar to those in the U.S. by allowing solicitation before distributing Japanese Solicitation Documents.[132]

### *D. Universal Proxy Rule*

1. U.S.

a. Outline of Rule

Effective as of January 31, 2022, the Universal Proxy Rules necessitate the adoption of a universal proxy card

[129] *See* Briggs, *supra* note 29, at 126 ("[L]obbying has become one of the most important weapons in an activist's arsenal. After testing the waters as described, an insurgent may conclude that a carefully planned lobbying campaign potentially could achieve m of what could be accomplished with a full-scale proxy contest, but at fraction of the cost.").

[130] Briggs, *supra* note 112, at 690.

[131] *See infra* Section IV.A.2.

[132] Companies Act, art. 301, para. 1 (Japan).

("UPC") in the directorial contested elections that do not fall under the exemption of Rule 14a-2(b).[133] In contested elections, every involved party must issue their respective UPC.[134] The UPC, which must list all the director nominees regardless of whether the directors, is put forward by the company or by dissenting shareholders.[135] This change empowers shareholders who vote by proxy to choose from various proposed director slates, mirroring the choices they would have if voting in-person at a contested shareholder meeting.[136]

*(1)Information to be Included in a Universal Proxy Card*

Within each group on a UPC, the nominees must be listed in alphabetical order by last name[137] and presented in the same font type, style, and size.[138] The UPC must prominently

[133] The new rules require shareholders presenting their own director candidates in the contest to solicit holders of a minimum of 67 percent of the voting power of shares entitled to vote in the election to trigger the UPC. *Fact Sheet: Universal Proxy Rules for Director Elections*, *supra* note 5.

[134] 17 C.F.R. § 240.14a-19; Arthur B. Crozier & Gabrielle E. Wolf, *Musings and Questions About the Universal Proxy Card*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 6, 2023), https://corpgov.law.harvard.edu/2023/03/06/musings-and-questions-about-the-universal-proxy-card/ [https://perma.cc/D7FD-L5QQ].

[135] 17 C.F.R. § 240.14a-19.

[136] Ronald Oral, *Activist Investing Today: Goodwin's Sean Donahue on Universal Proxy Cards and More*, THE DEAL (June 23, 2022), https://www.thedeal.com/podcasts/activist-investing-today-goodwins-sean-donahue-on-universal-proxy-cards-and-more/ [https://perma.cc/89RH-CQ9G]. This change was intended to make it more efficient for activist shareholders to run campaigns, and for shareholders to vote "ala carte" for director nominees. Michael Levin, *The Cost of Proxy Contests*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 25, 2022), https://corpgov.law.harvard.edu/2022/05/25/the-cost-of-proxy-contests/ [https://perma.cc/4KUV-YJDE]

[137] 17 C.F.R. § 240.14a-19(e)(4).

[138] 17 C.F.R. § 240.14a-19(e)(5).

disclose the maximum number of nominees for which voting authority can be granted.[139] The UPC must also prominently disclose the treatment, as well as the effect of a proxy, which is executed in a manner that grants authority to vote for fewer or more nominees than the number of directors being elected or that does not grant authority to vote with respect to any nominees.[140]

### *(2)Dissenting Shareholders' Obligation to Notify Their Candidate*

A dissident who intends to solicit at least 67% of outstanding shares for the dissident's own nominees in an election contest must give the company notice of the names of such own nominees at least 60 calendar days prior to the anniversary of the previous year's annual meeting date.[141]

### *(3)Other Amendments: Disclosure of Voting Standards and Options*

Rule 14a-4(b)(4) has also been revised in three major ways. First, this amendment mandates the inclusion of an "against" option on proxy cards for the election of directors (whenever "against" votes are legally effective) regardless of whether a proxy contest is present or not. If "against" votes are not legally effective, the amendment prohibits the inclusion of an "against" option on proxy cards, mandating instead the

[139] 17 C.F.R. § 240.14a-19(e)(6).

[140] 17 C.F.R. § 240.14a-19(e)(7).

[141] 17 C.F.R. § 240.14a-19(a), (b). This notice rule enables parties in a proxy fight to be aware of the activation of the universal proxy card. This allows the issuer time to obtain the names of all candidates for creating the UPC. Universal Proxy, Exchange Act Release No. 34,93596, 86 Fed. Reg. 68330, 68336 (Dec. 1, 2021). The SEC notes that most companies' bylaws set deadlines earlier than the one required by Rule 14a-19(b), so it should not affect dissenting shareholders. *Id*. at 68337. This provision is significant when the issuer's bylaws do not set a pre-notification schedule or the deadline is shorter than 60 days.

inclusion of an option to "withhold authority to vote."[142] Second, in the context of director elections under a majority voting standard, shareholders who do not wish to support or who oppose a nominee are provided the opportunity to "abstain" from voting rather than merely "withhold authority to vote."[143] Finally, the amendment modifies Item 21(b) of Schedule 14A to require clear disclosure of the effects of "withhold" votes.[144]

b. 2023 Proxy Season Outcome: The First Full Year under UPC Rule

(*1)"[T]he most remarkable thing about the data is how unremarkable it has been"*[145]

Contrary to some experts' forecasts of a surge in activist investor campaigns and a greater chance of activist success in acquiring more board seats,[146] the data from the 2023 proxy

[142] 17 C.F.R. § 240.14a-4(b)(4).

[143] *Id.*

[144] *Universal Proxy: A Small Entity Compliance Guide*, SEC, https://www.sec.gov/resources-small-businesses/small-business-compliance-guides/universal-proxy.

[145] *A Review of Proxy Fight Outcomes Under the Universal Proxy Rules*, DEAL POINT DATA, at 1 (Dec. 15, 2023), https://www.dealpointdata.com/res/dpd_review_proxy_fights_upc_20231215.pdf [https://perma.cc/N9SH-LSV4].

[146] Kai Liekefett et al., *Welcoming the Universal Proxy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 8, 2022), https://corpgov.law.harvard.edu/2022/08/08/welcoming-the-universal-proxy/ [https://perma.cc/R6PC-U6KJ]; Lauren Thomas, *Companies Brace for Onslaught of New Activists After Change in Proxy-Voting Rules*, WALL ST. J. (Nov. 19, 2022, 5:30 AM), https://www.wsj.com/articles/companies-brace-for-onslaught-of-new-activists-after-change-in-proxy-voting-rules-11668902603; 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/CPT2-VFCS].

season in the U.S. suggests otherwise.[147] Looking at the top line numbers, the 2023 proxy season initially resembles the last few seasons. For instance, 403 U.S.-based companies were publicly subjected to activist demands in the first half of 2023.[148] That is similar to the number of U.S. companies targeted during the first half of each year between 2017 and 2022, which ranged from 362 to 448 companies.[149] Moreover, the actual count of proxy contests in 2023 aligns closely with the preceding years' averages.[150] From September 1, 2022, to August 31, 2023, FactSet identified 72 proxy fights at U.S.-based non-fund companies against a five-year average of 77.4. Of the 72 proxy fights, there were 32 settlements (against a five-year average of 25.8) and 18 contested elections that proceeded to a vote (against a five-year average of 25.2).[151]

Although one year does not make a trend,[152] one potential explanation for this unexpected outcome is that a reform of proxy rules may not have an impact on the frequency of contests if such reform does not change the Solicitor's costs. Namely, it could be that the introduction of the UPC did not have an impact on the extent of activists' activity because the UPC rule neither increased nor decreased the activists' costs. Prior studies support this analysis. For example, before its implementation in 2007, the electronic proxy ("e-proxy")[153]

[147] Kurt Moeller, *The Hidden Effects of Universal Proxy Cards*, FTI CONSULTING (Nov. 14, 2023), https://www.fticonsulting.com/insights/articles/hidden-effects-universal-proxy-cards [https://perma.cc/RN6L-TJZS].

[148] *Shareholder Activism in H1 in 2023*, DILIGENT (July 2023), https://learn.diligent.com/rs/946-AVX-095/images/InsightiaDiligent_ActivismQuarterly_H12023.pdf [https://perma.cc/6W27-QW2S].

[149] *Id.*

[150] *Id.*

[151] Gregory et al., *supra* note 63.

[152] DEAL POINT DATA, *supra* note 144, at 3.

[153] The e-proxy rules require that the proxy materials be posted on a website and that the notice to shareholders be mailed at least 40 calendar days before the annual meeting. Starting from January 1, 2009, all issuers and others who file proxy statements with the

was anticipated to "spur proxy fights",[154] similar to experts' prediction that the UPC would produce the escalation in proxy contests. However, in reality, the e-proxy did not yield such effects.[155] This outcome can be attributed to the e-proxy's negligible effect on the costs incurred by Solicitors.[156] Furthermore, other previous studies have indicated that the reasons why changes in various proxy rules influence dissidents' decisions to engage in proxy contests are because such changes either raise or lower costs borne by the dissident-Solicitors.[157] However, the median activist costs remained unchanged at $1 million in both the 2022 and 2023 U.S. proxy seasons.[158] Section IV.C. will demonstrate that a comparison of the entire proxy rules between the U.S. and Japan has also yielded similar observations to the above potential explanation.

*(2)Some "Anomalies"*

A more detailed analysis reveals several distinct anomalies that could be attributed to the introduction of the UPC.[159] The first change appears counterintuitive. The UPC lists all

SEC became subject to the SEC's electronic proxy delivery rules, known as the "e-proxy rules." The e-proxy rules offer two distinct approaches for issuers and others involved in proxy solicitation: the "notice only option" and the "full set delivery option." 17 C.F.R. § 240.14a-16.

[154] Fabio Saccone, *E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting*, CONFERENCE BD., at 6 (Dec. 2010), https://www.shareholderforum.com/e-mtg/Library/20101200_ConferenceBoard.pdf [https://perma.cc/WZJ8-87WA].

[155] *Id.*

[156] *Id.*

[157] *See, e.g.*, Bebchuk & Kahan, *supra* note 11, at 1082, 1088–1126; Vyacheslav Fos, *The Disciplinary Effects of Proxy Contests*, 63 MGMT. SCI. 655, 657–58 (2017). It should be noted that the reverse is not necessarily true. Therefore, further verification is needed for the potential explanation provided in this Section.

[158] DEAL POINT DATA, *supra* note 144, at 3.

[159] Moeller, *supra* note 146.

director candidates on both proxy cards, making the direct comparison between activist and company board nominees easier. As a result, it now appears more likely that an activist could nominate someone perceived as a far better candidate than an incumbent director. One would assume the activist could persuade shareholders to elect the activist's nominee on that basis alone (i.e., the activist nominee's relatively better candidacy) without making a solid case for change at the company which is usually needed to win.[160] This may lead to a scenario where a vulnerable director on a company's board would be sufficient motivation for an activist to initiate a campaign, potentially incentivizing companies to refresh their boards proactively. However, the 2023 reality differed from this expectation.[161] By contrast with previous years, the number of new directors added to Russell 3000[162] companies noticeably decreased.[163]

Additionally, there was a shift in the pattern of activists winning board seats. Before UPC's introduction, securing

[160] *Id.*

[161] *Id.*

[162] To compare Japan and the U.S. in this note, the data from companies belonging to the Russell 3000 will be used as a benchmark for the U.S., given that the total number of listed companies in Japan is approximately 3,900 (3,928 companies as of January 31, 2024). *Number of Listed Companies / Shares*, JAPAN EXCH. GRP., https://www.jpx.co.jp/english/listing/co/index.html [https://perma.cc/ZF4H-TRAR].

[163] As one author reported:

> During the first nine months of 2023 (Q1-Q3), 1,195 companies in the Russell 3000 added directors. That was fewer companies adding directors than in the first nine months of any of the previous six years. Additionally, during each of those prior periods, at least 1,213 Russell 3000 companies added directors, with a median of 1,345 companies adding directors. Similarly, Russell 3000 companies appointed fewer directors in Q1-Q3 23 than in any corresponding period from 2017 through 2022. This year, 1,849 directors were appointed, below the previous low of 2,081 appointed in Q1-Q3 17, and well below the median of 2,276 appointments in the first nine months of each year from 2017 through 2022.

Moeller, *supra* note 146.

seats without support from a major proxy advisor, ISS, or Glass Lewis was rare.[164] However, 2023 witnessed several instances where activists succeeded in proxy contests without the endorsement of both ISS and Glass Lewis, an outcome that was unexpected.[165]

Taken together, these developments suggest that activists are likely to increasingly target companies with perceived weaker directors, rather than simply launching increased number of proxy contests. The degree to which the UPC influenced these outcomes[166] requires further analysis.[167] Nonetheless, these developments should serve as an impetus for companies to regularly review their directors' competencies in the context of the current market and consider potential board refreshments annually.[168]

2. Japan

[164] *Id.*

[165] *Id.*

[166] One potential explanation is that companies with such weak directors are relatively small to mid-sized, and these companies may not have been able to adequately deal with the burden imposed by the UPC. *See* FTI CONSULTING, *supra* note 8. FTI Consulting has pointed to the trend of more success by targeting smaller-cap firms relative to mid- and large- cap firms in the first half of 2023. FTI Consulting explained that this could be a result of the UPC because the new rules certainly seem more burdensome for smaller companies as it becomes more costly to defend each and every incumbent director up for election whereas large-cap firms have much more capital to fend off. Additionally, smaller firms are more likely to experience director turnover than larger firms because shareholders in smaller firms are less supportive of their board candidates. *See* Merel Spierings, *2023 Proxy Season Review*, CONFERENCE BD., at 16 (2023), https://www.conference-board.org/pdfdownload.cfm?masterProductID=49228 [https://perma.cc/GST7-XLRS].

[167] DEAL POINT DATA, *supra* note 144.

[168] FTI CONSULTING, *supra* note 8; Martin Lipton et al., Steven A. Rosenblum, Karessa L. Cain and Carmen X.W. Lu, *Thoughts for Boards: Key Issues in Corporate Governance for 2024*, WACHTELL, LIPTON, ROSEN & KATZ, at 2 (Dec. 21, 2023), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28464.23.pdf?ck=7341 [https://perma.cc/9LL9-36K4].

a. Similarity in Both Systems and Implications of Japanese Past Practice to the UPC

When a proxy fight for the election of directors occurs in Japan, all candidates must be listed on each side's proxy card.[169] Recall that the JCA and stock exchange regulations require the adoption of a written voting system for companies with more than 1,000 shareholders and publicly held companies.[170] Further, shareholders who meet certain criteria can make shareholder proposals including those of the shareholders' nominee for the director election.[171] Where such proposals have been made, the company must include these proposals[172] in the Voting Forms and the Shareholder Reference Documents that are provided to shareholders.[173]

Consequently, Japan's system is more favorable to insurgents than the U.S. system because, in Japan, the company must include insurgents' proposals in Voting Forms at the company's expense, regardless of the content of such proposals so long as such proposals are legally valid. Seeing this from the perspective of the U.S. system, the UPC can be evaluated as an intermediary of the existing systems in two countries. That is, (i) the UPC retains the nature of the traditional U.S. proxy system because the UPC does not allow dissenting shareholders to add their nominee in the shareholder meeting agenda. However, at the same time, (ii) the UPC resembles Japan's system because the UPC requires the company to provide dissenting shareholders with the means to directly seek fellow shareholders' consent of the dissenting shareholders' proposals (e.g., such shareholders' candidates) at the company's cost. Although the e-proxy is

169 TAISHIDO ET AL. *supra* note 10, at 167.

170 *See supra* Section II.D.

171 *See infra* Section V.B.2.

172 With regards to director election, all insurgent candidates must be included on all proxies. AOI FUKUMOTO, BEI-KOKU NO YUNIBĀSARU PUROKISHI NO DŌNYŪ [INTRODUCTION OF UNIVERSAL PROXY IN THE U.S.] 51, https://www.jsri.or.jp/publish/report/pdf/1737/1737_04.pdf [https://perma.cc/WMR3-TFM2].

173 *See infra* Figure B (cases 1 and 2 samples).

widely used in the U.S., contestants deliver a full set of solicitation material to garner shareholders' attention instead of relying on the "notice only" option.[174] This demonstrates how important it is in practice to deliver materials to shareholders in contested situations.

These two methods (i.e., proxy and written voting) always allow shareholders in Japanese companies to vote for any combination of candidates recommended by the management and those recommended by the dissenting shareholders. Thus, Japan has traditionally provided voting opportunities similar to the Universal Proxy Rule, both systematically and in practice.[175]

Turning to the past practice in Japan, shareholder proposals[176] and associated director contest campaigns have been infrequent in Japan until recently.[177] (*See* 40-year trend (1983-2023) in number of shareholder proposals in Japan illustrated in *infra* Figure C and specifically for director contests during the period between 2014 and 2020 in *infra* Figure D).[178] Also, even in recent years, with the increase in the number of shareholder proposals, the proportion of these proposals approved at shareholder meetings remains less than five percent.[179]

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[174] Sanford Lewis, S'holder Rts. Grp. *SEC Resets the Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 23, 2021), https://corpgov.law.harvard.edu/2021/12/23/sec-resets-the-shareholder-proposal-process/#:~:text=The%20new%20bulletin%20resets%20the,the%20current%20state%20of%20investor [https://perma.cc/KLC5-PES4].

[175] Fukumoto, *supra* note 171.

[176] As mentioned above, in Japan, shareholder proposals under the written voting system, rather than proxy solicitations, serve as a major means of opposition for insurgents. *See infra* Sections II.C & II.D.

[177] VANGUARD INV. STEWARDSHIP, *supra* note 115.

[178] *See infra* Section V.B.4. As mentioned, due to lack of proxy material registration system, it is difficult to calculate the actual number of proxy contests happening in Japan. *See supra* Section III.A.2.

[179] *Kateta no wa 6%: 2022-nen "kabunushi teian no shōhai" zen risuto* [*Winning was only 6%: The complete list of 'Shareholder Proposal Wins and Losses' in 2022*], TOYO KEIZAI ONLINE (July 25,

Given these developments in Japan, it would be difficult to conclude that allowing shareholders to "mix and match" management and dissident nominees on a Voting Form or a proxy card leads to an increase in contested situations including proxy solicitations or results favorable to dissenting shareholders. Recall that, as noted above, immediately following the introduction of the UPC Rule in the U.S., there was no significant change in the number of proxy fights or in the success rate of activist shareholders compared to previous years.[180] This outcome in the U.S. is consistent with Japan's past performance trends.[181]

b. Ambiguity in Rules Handling Shareholders Voting Intent and Recent Relevant Case

As mentioned above,[182] the SEC also adopted rule amendments to require enhanced disclosure and voting options in all director elections. In contrast, Japanese laws often lack clear guidelines for cases where the content of a shareholder's expression of intent is unclear. For instance, the precedence of voting methods when a shareholder expresses his or her intent through multiple methods (such as written voting, proxy, or actual attendance on the shareholder meeting) is left to the company's discretion.[183] There are no specific regulations on the treatment of blank votes on Voting

2022), https://toyokeizai.net/articles/-/605950 [https://perma.cc/NSV3-6FP4]. See also *infra* Section V.B.4., for the details of the recent trend of shareholder proposals in Japan.

[180] *See infra* Section III.D.1.b.

[181] Professor Scott Hirst of Boston University expressed, prior to the introduction of UPC, the view that the introduction of the UPC is unlikely to lead to an increase in proxy fights or the success of special interest groups. Scott Hirst, *Universal Proxies*, 35 YALE J. ON REG. 437, 439 (2018).

[182] *See supra* Section III.D.1.a.

[183] Kaishahō shikō kisoku [Regulations for Enforcement of the Companies Act], Ministry of Justice Ordinance No. 12 of 2006, art. 66, para. 1 (Japan).

Forms.[184] One of the major reasons for the lack of clear rules to handle situations where a shareholder's voting intention is ambiguous, is that in Japan, contested situations (e.g., hostile takeovers and evenly divided votes) have not been so common, and the lack of such clear rules has rarely influenced the final outcomes of shareholder resolutions.[185]

However, recently, a controversial case arose where a shareholder of Kansai Super Market Ltd ("KSM") (a listed Japanese company) attended KSM's extraordinary general shareholder meeting (the "EGM" and the litigation, *Kansai Super Market Shareholder Derivative Litigation*[186]). The EGM agenda, proposed by KSM's management, was whether to approve the merger with H2O Retailing Corporation. The shareholder attended the EGM in person and mistakenly voted "abstain" (despite indicated, prior to the EGM, "support" via proxy card sent from KSM).[187] The director of KSM, who chaired the EGM, considered the circumstances beyond the shareholder's action on its face and, consequently, counted this vote as "support," leading to the resolution's approval (the vote was crucial for the approval requirements of the EGM agenda).[188]

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[184] *Id*. In practice, if a shareholder who has voted by written form or proxy attends the shareholder meeting in-person, his or her vote at the meeting generally takes priority. As noted by one author, "[r]egarding the written voting system, Article 298, Paragraph 1, Item 3 of JCA presupposes 'shareholders not attending' the meeting. Additionally, it is rational to infer that shareholders who actually attend the general meeting have withdrawn their proxies." Kenichiro Osumi et al., *Kabunushi sōkai* [*Shareholders' Meeting*], JURISUTO [JURIST], at 47.

[185] *See* Yuji Ito, *Kansai sūpā jiken Saikōsai kettei* [*Kansai Super Case Supreme Court Decision*], 1571 JURISUTO [JURIST] 73–74 (2022).

[186] *Japan's Top Court Backs Kansai Super Market Merger with H2O Retailing*, REUTERS (Dec. 14, 2021), https://www.reuters.com/article/markets/asia/japans-top-court-backs-kansai-super-market-merger-with-h2o-retailing-idUSKBN2IT0IO/.

[187] Ito, *supra* note 184.

[188] *Id.*

OK Corporation, also a shareholder of KSM and was interested in acquiring KSM at that time, subsequently challenged the chairman's action as illegal and sought to annul the resolution.[189] The lower court prioritized the shareholder's voting behavior (i.e., indication of "abstain") at the EGM[190] and concluded that the chairman's action was illegal.

On appeal, the top court deferred to the chairman's discretion in considering circumstances beyond the shareholder's action on its face and upheld the resolution as valid.[191] This case has limited application, under which circumstances beyond shareholders' voting behavior may be considered. However, the case illustrates the necessity to clear up the ambiguity in Japan's voting rights exercise system.[192]

## IV. ENFORCEMENT OF PROXY RULES

[189] REUTERS, *supra* note 185.

[190] This is in line with the traditional shareholder meeting practice in Japan.

[191] The Court outlined the following: voting rights exercise during a shareholders' meeting is a fundamental right of individual shareholders, reflecting their views on matters affecting all shareholders' decisions. Therefore, it is reasonable to conclude that when voting rules are unclear, leading to shareholder confusion, and when it is evident that shareholders' intentions differ from their voting forms due to misinformation, the chairman, responsible for a fair meeting, can consider these factors to understand voting content. In this case, the shareholder with voting authority attended the meeting, implying the withdrawal of their proxy. However, the shareholder mistakenly believed their proxy still applied, leading to a blank vote. Since the rules for such misinformation were not disclosed, and the shareholder's intention was different from their voting form due to this mistake, the chairman can reasonably interpret it as an affirmative vote, given the circumstances and absence of arbitrary treatment.

[192] Ito, *supra* note 184, at 77–79. Furthermore, in the future operation of shareholders' meetings in Japan, it will be necessary to explain to shareholders that even if a shareholder exercise his voting right through a written voting system or proxy, the company shall notify him of the rule that that voting will be treated as withdrawn if the shareholder attends the shareholder meeting. *Id*.

This Part investigates the enforcement mechanisms for the proxy rules of both countries. In this examination, common, proxy contest-related issues in both nations are identified.

## *A. U.S.*

### 1. Regulatory Enforcement

#### a. Antifraud Provisions

In U.S. proxy solicitation regulations, the antifraud rule was established to ensure fairness in solicitation.[193] This rule prohibits solicitations through proxy statements or other written or oral communications that either contain false or misleading statements regarding material facts or omit material facts necessary to make the statements not misleading.[194] The determination of what constitutes a "material fact" depends on whether a reasonable shareholder would consider the fact important in deciding how to vote.[195]

#### b. SEC Review and Its Limit

As noted earlier, preliminary U.S. Solicitation Documents must be submitted to the SEC by Solicitors and such documents may be subject to the SEC's pre-registration review.[196] Although the SEC staff lack formal authority to "approve" a definitive proxy statement, it is standard practice to distribute proxy materials until the SEC staff has no further comments on the draft statements. As a result, a customary review period of a around 10 days to up to six to eight weeks follows the initial filing, during which revised drafts are submitted for SEC feedback the staff is satisfied with the disclosures in the proxy statement.[197]

[193] 17 C.F.R. § 240.14a-9.

[194] 17 C.F.R. § 240.14a-9(a).

[195] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[196] 17 C.F.R. § 240.14a-4(f).

[197] Eugene F. Cowell III, *New Internet Technology Permits New Proxy Contest Techniques*, AKIN GUMP STRAUSS HAUER & FELD LLP,

If corrections are not made, the SEC can seek legal remedies. In cases of severe violations, the SEC may request the U.S. Department of Justice pursue criminal prosecution.[198] However, active intervention by the SEC, especially in the context of proxy contests, is not frequent.[199]

Additionally, since the 1992 amendment of the SEC Rule, pre-registration of solicitation materials other than the U.S. Solicitation Documents is not required.[200] This led to a reduction in the power of the pre-check function played by the SEC. The SEC suggests that the appropriate response to contentious solicitation materials is for the contesting parties to provide additional materials explaining their views, offering a timely and cost-effective way to present counterarguments.[201]

### 2. Private Enforcement

Although the SEC Rule does not explicitly provide for private parties to sue for violations of proxy solicitation regulations, case law allows shareholders to seek redress in courts.[202] The U.S. Supreme Court has stated that – as a practical matter – the SEC cannot adequately review the vast number of the U.S. Solicitation Documents and conduct independent investigations of facts.[203] This Supreme Court decision implies that private enforcement can complement the SEC's efforts. Thus, private litigation plays a role in enforcing

https://www.akingump.com/a/web/980/aogHc/400.pdf [https://perma.cc/HX8U-KETE].

[198] LINDA CHATMAN THOMSEN, SEC, INTERNATIONAL INSTITUTE FOR SECURITIES MARKET DEVELOPMENT, https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf [https://perma.cc/NX95-4MS9].

[199] HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW 24–136 (2d ed. 1998).

[200] *See* discussion *supra* Section III.A.1.

[201] Regulation of Communications Among Shareholders, Exchange Act Release No. 31,326, 57 Fed. Reg. 48276, 48284 (Oct. 22, 1992).

[202] J.I. Case Co. v. Borak, 377 U.S. 426, 430 (1964)

[203] *Id.* at 432.

the proxy solicitation rules and, ultimately, supplements the regulator's role in realizing the regulatory objectives.

Courts have broad discretion to provide appropriate relief to fulfill the objectives of SEC Rule 14(a), often demanding correct disclosure from Solicitors before shareholder meetings. Remedies can include injunctions against solicitation, prohibition of the use of a proxy form, invalidation of director appointments or approved transactions, compensation for damages, and payment of attorney fees.[204] Courts may also postpone shareholder meetings to allow for proper solicitation in cases of illegal solicitation.[205]

## *B. Japan*

### 1. Regulatory Enforcement

In Japan, similar to the U.S., regulations aim to ensure fairness in solicitation. Solicitors cannot use documents that contain false statements about material matters or omit necessary facts that prevent misunderstandings.[206] Unlike in the U.S., where pre-filing reviews are conducted, Solicitors in Japan must submit copies of reference documents to the local finance bureau after distribution, with no *ex ante* review by regulatory authorities.[207] If a violation is discovered, authorities can seek legal actions, such as prohibitions or

[204] *The Interrelationship Between Public and Private Securities Enforcement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 11, 2011), https://corpgov.law.harvard.edu/2011/12/11/the-interrelationship-between-public-and-private-securities-enforcement/ [https://perma.cc/U6Z5-MWBS]

[205] Central Foundry Co. v. Gondelman, 166 F. Supp. 429, 447 (S.D.N.Y. 1958).

[206] Kin'yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Law No. 25 of 1948 art. 18, para. 1 (Japan).

[207] In Japan, even initially, a prior review system was adopted, but it was abolished by an amendment in 1955. *Misao Tatsuta, Proxy System of Joint Stock Companies – From the Perspective of Investor Protection*, 1 INV. 1, 14 (1968). Japanese written voting systems also have no *ex ante* review by regulatory authorities.

suspensions of the solicitation actions.[208] However, these emergency injunctions require time for investigation and court decisions,[209] making them less effective against short-term proxy solicitations.

The question then arises as to whether Japan should require submission for *ex ante* review, similar to the U.S. Such pre-submission might not overly burden authorities because of the smaller number of proxy solicitations in Japan.[210] However, focusing on the disciplinary effect that arises from the contention between contestants might be more effective in ensuring fairness than relying on actual regulatory oversight because proxy solicitations often occur in contexts of conflict between incumbent management and shareholders.[211] During such conflicts, opposing parties have incentives to scrutinize and challenge each other's materials. This approach aligns with the abovementioned emphasis on private enforcement in the U.S. Japan could benefit from making all solicitation materials publicly available, enhancing transparency and fairness.[212]

### 2. Private Enforcement

Possible private enforcement measures against violations of proxy regulations in Japan differ depending on whether the

[208] Kin'yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Law No. 25 of 1948, art. 23-11, para. 1 (Japan).

[209] HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [CORPORATE LEGISLATION SUBCOMMITTEE OF THE LEGISLATIVE COUNCIL], DAI 12-KAI KAIGI GIJIROKU [MINUTES OF THE 12TH MEETING OF THE COMPANY LAW SECTION] 55 (2011), https://www.moj.go.jp/content/000080186.pdf [https://perma.cc/9TK7-7JPV] (Japan).

[210] It should also be considered that in Japan when conducting a tender offer which has the similar function to change a company's management structure, all disclosure documents to undergo *ex ante* review by the Financial Services Agency and be disclosed through EDINET (Electronic Disclosure for Investors' NETwork) system.

[211] Matsushita, *supra* note 117, at 56.

[212] *See supra* Section III.B.2.

enforcement measures are implemented before or after the shareholders' meeting resolutions.

a. Prior to the Shareholder Meeting Resolution Has Been Passed

Measures include seeking an injunction against the illegal solicitation activities, the exercise of voting rights based on illegally obtained proxies, or the holding of a shareholder meeting or resolution on a related proposal.[213] Legal methods to take such measures include provisional injunctions accompanying a lawsuit for the cancellation of a shareholder meeting resolution, provisional injunctions for confirmation of the non-existence of proxy authority based on illegal solicitation, and provisional injunctions related to the illegal actions of directors or Solicitors.[214]

However, among other requirements, the requirement of "necessity of preservation" in such provisional injunctions is cautiously judged by courts and is generally difficult to prove.[215] Increasingly flexible provisional injunction systems might be worth exploring because private enforcement is important to ensure fairness in the proxy solicitations as discussed above.[216]

b. After the Shareholder Meeting Resolution Has Been Passed

[213] TAISHIDO ET AL., *supra* note 10, at 268–71.

[214] *Id.*

[215] *See* HARUKA MATSUYAMA, TEKITAI-TEKI KABUNUSHI TEIAN TO PUROKISHI-FAITO [HOSTILE SHAREHOLDER PROPOSALS AND PROXY FIGHT] 218 (3d ed., 2021) (Japan).

[216] Matsushita, *supra* note 117, at 57. Under Japanese law and practice, in addition to (i) the system as a general rule, the Japanese injunctive action system has (ii) individual types of actions with different requirements to be plead to the court and different methods of hearing according to the nature of the matter. Many matters related to corporate actions have individual systems established as (ii), but the general rule in (i) is currently applied to those related to violations of proxy solicitation regulations.

If solicitation is conducted in material violation of Japan's proxy rules (e.g., there is a materially false statement in the proxy statements), the violation may constitute grounds for rescission of the shareholder meeting resolution.[217] However, if the shareholders' meeting resolution is annulled, there may be a situation where matters that should originally be decided remain undecided. This can potentially have a negative impact on the management of the company's business.

Thus, it is critical to have effective regulations to combat unlawful proxy solicitation before the adoption of resolutions at the shareholder meeting.

### *C. Summary*

To summarize the discussions from Part II through IV, a comparison of proxy rules between the U.S. and Japan reveals that the U.S. system is more stringent and imposes more constraints on the actions of dissenting shareholders. Compared to Japan, the U.S. has (i) a wider scope of application for proxy rules, (ii) broader requirements for information disclosure, (iii) a system of pre-filing solicitation materials with regulatory authorities, and (iv) a public inspection system. Additionally, as discussed later in Section V.A., the difficulty of shareholder access to shareholder lists in the U.S. also contributes to the relative stringency of its proxy rules. However, at the same time, the U.S. system has put in place detailed exemption[218] and pre-registration solicitation rules[219] to ensure that the system is not overly restrictive.

Furthermore, this finding, when coupled with the fact that the volume of proxy solicitations by shareholders in the U.S. has been overwhelmingly higher than in Japan,[220] implies that there could not be a strong correlation between the stringency of the proxy rules for Solicitors and the decisions of

[217] TAISHIDO ET AL., *supra* note 10, at 268–71.

[218] *See supra* Section II.A.2.

[219] *See supra* Section III.C.1.

[220] *See supra* Sections II.C.-D.; *see also supra* note 63.

potential contestants to enter into a proxy contest.[221] Considering the aforementioned prior studies regarding the relationship between proxy rule changes, their cost impact, and entry decisions, [222] the finding can be rephrased as the proxy rules may not have a significant impact on dissidents' decision-making to conduct proxy contests, so long as the proxy rules do not affect the costs borne by the dissident-Solicitors.[223] Tightening regulations may deter the use of the proxy system due to concerns about potential liabilities for violation of disclosure obligations, which would also impose potential costs on Solicitors.[224] However, the above findings indicate that the current differences in the strictness of regulations between the U.S. and Japan are not substantial enough to constitute the actual deterrent for shareholder activists. This suggests that a deterrent effect could occur only in cases where regulations are exceptionally stringent. Thus, possible system reforms for Japan do not necessarily discourage the use of proxy solicitation in Japan.[225]

## V. OTHER RELEVANT RULES

As a final section, this Note shifts focus to systems other than the proxy rules. It examines the differences and similarities between the U.S. and Japanese systems regarding shareholder inspection and shareholder proposals, both of which are particularly crucial when dissenting shareholders

[221] Note that while there seems be no direct correlation between the rigidity of a system and shareholder decision-making, excessively stringent regulations can impede shareholder activities and potentially influence their strategic choices.

[222] *See supra* Section III.D.1.b and notes 153 and 156.

[223] In Japan, similar to the U.S., all costs and expenses to conduct proxy solicitation must be covered by Solicitors.

[224] Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 489 (2008).

[225] U.S. proxy regulations are evaluated as reflecting the trajectory of discourse in corporate governance, particularly embodying the shift in power balance from management to shareholders. GOODMAN ET AL., *supra* note 89, at 10-3.

engage in director election contests. Lastly, the Note analyzes the practical trends of shareholder proposals in 2023 annual general meetings ("AGMs") of companies in the U.S. and Japan, and I offer a new perspective on global activism.

### *A. Requesting Shareholder Register Disclosure*

#### 1. U.S.

When someone other than the issuing company conducts a proxy solicitation, he or she must obtain the shareholder register from the company.[226] One of the activists' first "salvos" is the request for the shareholder lists of the target company.[227] Such list includes information such as shareholders' names, the number of shares held by them and their addresses.[228] U.S. shareholders can access the shareholder list either through federal law (SEC Rule) or through state laws.[229]

If an issuing company receives a written request from a shareholder planning to conduct a proxy solicitation, the company must either (i) disclose its shareholder register or (ii) distribute solicitation materials, provided by the requester, to the shareholders at the expense of the requester.[230] The choice between these two options is essentially at the discretion of the issuing company.

When an issuing company chooses to disclose its shareholder register, then the company must disclose the shareholder register within 5 business days of the request. In addition, if the company possesses a list of non-objecting

[226] COFFEE ET AL., *supra* note 20, at 572.

[227] Daniel H. Burd et al., *Sometimes You Have to Know the Plays the Other Team Is Calling*, NAT'L L. REV. (Nov. 18, 2021), https://www.natlawreview.com/article/sometimes-you-have-to-know-plays-other-team-calling [https://perma.cc/L2PT-SRRB].

[228] *Id*.

[229] COFFEE ET AL., *supra* note 20, at 572–73.

[230] *Id.* at 573; 17 C.F.R. § 240.14a-7.

beneficial owners (a "NOBO List"), then the requester can also elect to receive the NOBO List.[231]

On the other hand, when issuing companies choose to distribute solicitation materials, then the company must, in a reasonably prompt timeframe, mail the materials once such materials are provided, with expenses being paid by the requester.[232]

Issuing companies invariably choose the second option, resulting in this federal system not providing the requester shareholders with a level playing field. First, the companies can retain exclusive use of the shareholders list which blocks the insurgents from separately lobbying all of the shareholders.[233] Second, the issuing companies could delay the distribution of solicitation materials within permissible limits and review the materials provided by the requester before their distribution.[234] This allows the issuing companies to effectively counter the requester's strategy.[235]

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[231] Shamrock Assocs. v. Tex. Am. Energy Corp., 517 A.2d. 658 (Del. Ch. 1986); *see also* COFFEE ET AL., *supra* note 20, at 572–73. It is estimated that over 80% of publicly traded companies' shares are held in "street names." Broadridge Fin. Insts., *New Report Shows Lower Shareholder Voting Support at Smaller Public Companies*, PR NEWSWIRE (July 8, 2013, 8:30 AM), https://www.prnewswire.com/news-releases/new-report-shows-lower-shareholder-voting-support-at-smaller-public-companies-214586531.html [https://perma.cc/CF9X-FCDK]. Approximately 75% of these are held by shareholders who object to disclosing their information to the company. Concept Release, *supra* note 113, at 42,999. Thus, even with access to the NOBO List, it may not be possible to contact all shareholders.

[232] 17 C.F.R. § 240.14a-7.

[233] Randall Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 361 (1996).

[234] *Id.*

[235] *Id.* Legitimate purpose means the one which is reasonably related to the requestor's interest as a shareholder of the company, and it is generally construed that proxy solicitation falls within this purpose. Gen. Time Corp. v. Talley Indus., 240 A.2d 755, 756 (Del. 1968).

This analysis now considers rights under state law, with a focus on Delaware General Corporation Law (the "DGCL"). Under the DGCL, nominal or actual shareholders can request the shareholder register for a legitimate purpose.[236] To prevent the issuing company from gaining an unfair advantage in proxy solicitation, shareholders are entitled to receive the same shareholder register and information available to the company,[237] including, if available, the NOBO List.[238] There are instances where the issuing company may delay or refuse to provide access to the shareholder register by claiming the purpose is unjust.[239] In such cases, shareholders need to seek legal redress, potentially creating obstacles due to the time and cost involved.[240]

### 2. Japan

In Japan, all shareholders can request to inspect and transcribe the shareholder register from the issuing company, provided that the requesting shareholder(s) clarify the reason

[236] DEL. CODE ANN. tit. 8, § 220 (2024).

[237] Hatleigh Corp. v. Lane Bryant, Inc., 428 A.2d 350, 354 (Del. Ch. 1981).

[238] The company is not obligated to distribute the NOBO List to the shareholders without a NOBO List request. Shamrock Assocs. v. Tex. Am. Energy Corp., 517 A2d. 658 (Del. Ch. 1981).

[239] Among purposes held to be improper to access the shareholder registry are; to depress the value of shares; to sell a shareholder list for personal profit; to use the information in a competing business; and to aid in the defense of an action by the corporation against the shareholder. COFFEE ET AL., *supra* note 20, at 564-572.

[240] Seinfeld v. Verizon Commc'n, Inc., 909 A2d. 117 (Del. 2006) pointed to the increased number of inspection litigation. The court in *Seinfeld* required a stockholder seeking for disclosure of company documents to present some *credible basis* from which the court can infer that waste or mismanagement may have occurred under DGCL § 220. In another case, the court held that "[t]here must be *some evidence* of possible mismanagement as would warrant further investigation of the matter." Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 568 (Del. 1997) (emphasis omitted) (emphasis added) (quoting Helmsman Mgmt. Servs. v. A & S Consultants, 525 A.2d 160, 166 (Del. Ch. 1987)).

for their request.[241] A company can refuse the shareholder's request if the refusal falls within certain denial grounds, such as if the request is made for purposes other than ensuring or exercising shareholders' rights.[242] Generally, requests made for the purpose of proxy solicitation do not fall under these grounds for refusal.[243] However, as in the U.S., many institutional investors hold shares in custodian names, which makes it difficult to identify all of the beneficial shareholders who hold the voting power.[244] Therefore, to communicate directly with unidentifiable, substantial shareholders, it has become standard practice for Solicitors to conduct shareholder identification investigations through specialized third-party agencies.[245]

In Japan and the U.S., the requirements for requesting the disclosure of shareholder registries are similar. However, the Japanese system is more advantageous for dissenting

[241] Kaisha-hō [Companies Act], Law No. 90 of 2014, art. 4, para. 2 (Japan).

[242] *Id*. at para. 3.

[243] *See* TAISHIDO ET AL, *supra* note 10, at 124–26.

[244] Norihiko Sugiura & Akihisa Shibuya, *Kasutodi gyōmu hatten ni mukete no hōteki kadai ni tsuite: kasutodi gyōmu no genjō ni tsuite no hōkatsu-teki bunseki to saranaru hatten no tame no nokosareta hōteki kadai ni tsuite no kentō* [*Legal Challenges for the Development of Custody Business: A Comprehensive Analysis of the Current State of Custody Business and Examination of Remaining Legal Challenges for Further Development*], at 4 (Feb. 2005), https://www.fsa.go.jp/frtc/nenpou/2005/02.pdf [https://perma.cc/7V5Y-6H89].

[245] In this regard, Japan's Financial Services Agency has commenced its examination in response to suggestions that, to facilitate dialogue between corporations and shareholders/investors, it should consider creating a system whereby issuers and other shareholders can efficiently identify the actual shareholders who possess voting or investment authority distinct from the nominal shareholders for a given stock. KIN'YŪ SHINGIKAI [FIN. SYS. COUNCIL], KŌKAIKAITSUKE SEIDO TAIRYŌ HOYŪ HŌKOKU SEIDONADO TŌ WĀKINGU GURŪPU HŌKOKU [WORKING GROUP REPORT ON TAKEOVER BID SYSTEM AND LARGE SHAREHOLDING REPORTING SYSTEM] (2023), https://www.fsa.go.jp/singi/singi_kinyu/tosin/20231225/01.pdf [https://perma.cc/WMU4-NNK6] (Japan).

shareholders because disclosure is granted upon request (unless the request for the register falls under specific exclusions).[246]

### *B. Shareholder Proposals*

#### 1. U.S.

Shareholder proposals allow insurgent shareholders to approach fellow shareholders at lower costs because the insurgent's proposals can be included in the company's proxy statement.[247] This eliminates the need for separate proxy solicitation.[248] SEC Rule 14-8 stipulates that, to submit a proposal, a shareholder must have continuously held a certain value (at least $2,000) of the company's securities for a specific period (at least one year).[249] Proposals may not exceed 500 words.[250] Each shareholder may submit no more than one proposal for a particular shareholders' meeting[251] to be included in the proxy statement of the company.[252]

Even if shareholder proposals meet the above requirements, the company can exclude them from the proxy

[246] See also *supra* Section IV.C, for the relationship between the proxy system and the shareholder inspection system.

[247] For the median proxy contest from 2017-2020, the SEC estimates the company spent approximately $1.7 million and the activist spent $750,000. Universal Proxy, Exchange Act Release No. 34,93596, 86 Fed. Reg. 68330, 68352 (Dec. 1, 2021).

[248] COFFEE ET AL., *supra* note 20, at 598.

[249] 17 C.F.R. § 240.14a-8(b)(1).

[250] 17 C.F.R. § 240.14a-8(d).

[251] 17 C.F.R. § 240.14a-8(c).

[252] These proposals must be submitted to the company by a specific deadline. 17 C.F.R. § 240.14a-8(e). As a general rule, shareholder proposals must be submitted to the issuing company no later than 120 days before the anniversary of the previous year's annual shareholder meeting. In the case of a special shareholder meeting, the proposal should be submitted within a reasonable period before the printing and distribution date of the proxy statement. *Id.*; Facilitation Shareholder Director Nominations, Exchange Act Release No. 33,9136, 75 Fed. Reg. 56668 (Sept. 16, 2010).

statement on thirteen separate grounds,[253] many of which concern the subject of the proposal in question.[254] Management can request no-action relief from the SEC staff to exclude "unwelcome proposals" from the company's proxy statement.[255] Notably, directors may exclude proposals that pertain to the corporation's ordinary business operations,[256] director elections,[257] and specific dividend payments.[258] Thus, shareholders seeking to appoint their nominees must conduct separate proxy solicitations.

[253] On July 13, 2022, the SEC proposed revisions to proxy rules, aiming to restrict the criteria for the "substantial implementation," "duplication," and "resubmission" exclusions under Rule 14a-8. Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 34,95267, 87 Fed. Reg. 45052 (July 27, 2022) While intending to enhance clarity and transparency for shareholders and companies, *see Fact Sheet: Shareholder Proposals under Rule 14a-8: Proposed Rules*, SEC, https://www.sec.gov/files/34-95267-fact-sheet.pdf, these amendments could lead to a rise in shareholder proposals and reduce the likelihood of their exclusion. Marc S. Gerber et. al., *Proposed Amendments to the Shareholder Proposal Rules*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 11, 2022), https://corpgov.law.harvard.edu/2022/08/11/proposed-amendments-to-the-shareholder-proposal-rules/ [https://perma.cc/WY2G-84WK].

[254] 17 C.F.R. § 240.14a-8.

[255] Gregory Burke, *SEC Rule 14a-8 Shareholder Proposals: No-Action Requests, Determinants, and the Role of SEC Staff*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 12, 2023), https://corpgov.law.harvard.edu/2023/01/12/sec-rule-14a-8-shareholder-proposals-no-action-requests-determinants-and-the-role-of-sec-staff/ [https://perma.cc/W6SN-T827]

[256] 17 C.F.R. § 240.14a-8(i)(7).

[257] As the regulation states,

> [a] proposal relating to director elections could be excluded "[i]f the proposal: (i) [w]ould disqualify a nominee who is standing for election; (ii) [w]ould remove a director from office before his or her term expired; (iii) [q]uestions the competence, business judgment, or character of one or more nominees or directors; (iv) [s]eeks to include a specific individual in the company's proxy materials for election to the board of directors; or (v) [o]therwise could affect the outcome of the upcoming election of directors.
>
> 17 C.F.R. § 240.14a-8(i)(8).

[258] 17 C.F.R. § 240.14a-8(i)(13).

Since the turn of the century, the expansion of the shareholder right to participate in the corporate proxy process has been a central topic in the ongoing debate about shareholder empowerment.[259] The SEC decided in 2010 to adopt Rule 14a-11, which introduced the proxy access system. This system allows certain qualifying shareholders to include their nominees in the company's proxy statement.[260] However, the D.C. Circuit Court of Appeals invalidated part of this rule, questioning the economic justification for mandatory proxy access.[261] The D.C. Circuit left only the procedure for amending by-laws to allow shareholder nominations effective.[262]

### 2. Japan

The JCA allows shareholders who hold 1% of all voting rights or at least 300 voting rights for six months prior to the annual shareholders' meeting to request that certain matters be included as objectives in the shareholders' meeting.[263] Shareholders can also request that the company notify other shareholders about the details of these proposals.[264]

Proposals that violate laws, regulations or the firm's articles of incorporation, or are substantially identical to those

[259] *See* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 200-02 (4th ed. 2012).

[260] H.R. 4173, 111th Cong. § 971 (2010); Facilitation Shareholder Director Nominations, Exchange Act Release No. 33,9136, 75 Fed. Reg. 56668 (Sept. 16, 2010).

[261] Bus. Roundtable v. S.E.C., 647 F. 3d 1144, 1148 (D.C. Cir. 2011).

[262] DEL. CODE ANN. tit. 8, § 112 (2024). 17 C.F.R. § 240.14a-8(i)(8) prohibits exclusion from the proxy statement of a shareholder proposal for such a bylaw amendment. As a result, 66% of S&P 500 companies have bylaws to permit such proxy access. Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 527 (2018).

[263] Companies Act, art. 303 (Japan).

[264] Companies Act, art. 305 (Japan).

that failed to gain the required support in the past 3 years, are not permissible.[265] Recent amendments to the JCA in 2019[266] introduced provisions limiting the number of proposals that a shareholder can submit to ten in light of the emerging instances where shareholders abused these proposal rights.[267]

### 3. Analysis: Dissidents' Higher Initiative Under Japan's System

Although both the United States' and Japan's shareholder proposal systems are similar in their requirements, there are two significant differences that provide shareholders in Japanese companies with more initiative to submit proposals than their American counterparts.

First, the limitation on the number of proposals that these shareholders can make is much less restrictive in Japan.[268] Second, any proposals are allowed, so long as the proposals are "comprised of matters rightfully to be decided at the shareholders' meeting,"[269] which can be a powerful tool for

[265] *Id.* at para 6.

[266] Kaisha-hō [Companies Act], Law No. 70 of 2019, (Japan).

[267] Tetsuya Yamashita, *Ryō wa gan'nen kaisha-hō kaisei (2): Kabunushi teian-ken* [*Reiwa Era Company Act Amendment (2): Shareholder Proposal Rights*], NIHON SHŌKENTORIHIKISHO GURŪPU [JAPAN EXCH. GRP.], at 2 (Sept. 25, 2020), https://www.jpx.co.jp/corporate/research-study/research-group/nlsgeu000005c5tm-att/20200925_2.pdf [https://perma.cc/SDT5-HLDU].

[268] It is difficult to control the "overall" number of shareholder proposals by limiting the maximum number of proposals a single shareholder can make at each general shareholder meeting. Yasue Nakamura, *Kabunushi teian-ken no kyō-teki igi to sono seido-teki genkai* [*The Contemporary Significance and Institutional Limitations of Shareholder Proposal Rights*], 405–06 RITSUMEIKAN HŌGAKU [RITSUMEIKAN L. REV.], 508, 528 (2022), https://www.ritsumei.ac.jp/acd/cg/law/lex/22-56/025nakamurayasue.pdf [https://perma.cc/M9FG-A2P9]. As will be shown, in 2023, Japan had the highest record in number of the shareholder proposals. *See supra* Section V.B.4.

[269] Goto, *supra* note 63, at 135.

insurgent shareholders under Japan's written voting system.[270] More specifically, the U.S., through the SEC no-action process, grants discretion to SEC staff to determine the course of action available to insurgents (shareholder proposal or proxy). Recent research found that pressure on the individual SEC staff members and their experience in the no-action process play a crucial role in their final decision.[271] This results in a significantly more unstable system for insurgents than in Japan. Furthermore, if a shareholder proposal is excluded, the American system not only imposes substantial costs on insurgents for separate proxy solicitation,[272] but also considerably limits the means by which insurgents can approach shareholders to the extent that the company is not required to provide shareholders with an opportunity to know of or to express their intentions on insurgents' proposals. The eventually annulled proxy access rule was aimed to address issues (i), (ii)(a), and (ii)(b) whereas the UPC seeks to resolve the problems associated with (ii)(b).[273]

4. Recent Practice Trend

The shareholder proposal is an important right and an effective way for shareholders to influence company

[270] *See supra* Sections II.D and III.D.2.a.

[271] Burke, *supra* note 254.

[272] In the U.S., the burden of solicitation costs is considered to be a hindering factor for proxy solicitation by shareholders. Lucian A. Bebchuk, *Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 698 (2007). As for the median proxy contest, the SEC estimates the company spent $1.7 million and the activist spent $750,000. Universal Proxy, Exchange Act Release No. 34,93596, 86 Fed. Reg. 68330, 68352 (Dec. 1, 2021). There is no reason for shareholders in conducting proxy solicitation unless their benefits outweigh the costs incurred from such proxy solicitation. Furthermore, as a result of proxy solicitation, even if the company's share price increases, there is a so-called "free-rider problem" where shareholders can only enjoy the increase in proportion to their shareholding. Bebchuk & Kahan, *supra* note 11, at 1071, 1090, 1128.

[273] *See supra* Sections III.D.1 and V.B.1.

management and ensure open communication.[274] Thus, the exercise of proposals is one of the key measures of shareholder activism.[275]

In the U.S., there has been an increasing number of shareholder proposals.[276] During the 2023 proxy season, the number of shareholder proposals in the Russell 3000 soared to a record high of 836 proposals filed, compared to 801 in 2022 and 792 in 2021.[277] Over 54% of all submitted proposals were voted on in 2023, an increase from 50% in 2022.[278] Among these proposals, 25 proposals (less than 3% of the 836 proposals submitted and 5.1% of the 483 proposals voted) received majority support, as of June 1, 2023.[279]

Similarly, in Japan, the number of shareholder proposals has been rising. In 2023, a total of 416 shareholder proposals were made to 112 companies at shareholder meetings across all listed companies,[280] making this figure the highest number

[274] Bebchuk & Kahan, *supra* note 11, at 1077.

[275] *See, e.g.*, GEORGESON, INC., A LOOK BACK AT THE 2023 PROXY SEASON (2023), https://content-assets.computershare.com/eh96rkuu9740/5WbdEzA5AY7NJXLdLfdnZn/af1bcef40cc86fd046636eb6e6abedd9/wrap_up_2023_ppt_dec_11.pdf [https://perma.cc/6RXN-TXH4]; DILIGENT, *supra* note 3; FTI CONSULTING, *supra* note 8.

[276] *2023 Proxy Season Review: Part 1 – Rule 14a-8 Shareholder Proposals*, SULLIVAN & CROMWELL, at 1 (Aug. 11, 2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2023-proxy-season-review-part-1.pdf [https://perma.cc/AQH7-QQRW].

[277] Merel Spierings, *supra* note 165.

[278] *Id.*

[279] Calculated the percentages based on the data provided in Ronald O. Mueller et al., *Shareholder Proposal Developments During the 2023 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2023), https://corpgov.law.harvard.edu/2023/08/03/shareholder-proposal-developments-during-the-2023-proxy-season/ [https://perma.cc/4HZ4-Y7LV]. Majority support rate in 2023 is lower than in that in 2022 which had 55 proposals. *Id.*

[280] *2023-Nen 6 gatsu kabunushi sōkai shīzun no sōkatsu to shisa* [*Summary and Implications of the June 2023 Shareholders' Meeting Season*], DAIWASŌKEN [DAIWA INST. RSCH.], at 5 (Sept. 15, 2023), https://www.dir.co.jp/report/consulting/governance/20230919_0239

recorded to date[281] (*see infra* Figure C). As of June 30, 2023, the approval rate for shareholder proposals was approximately 2% (with 344 proposals and 7 proposals approved across 4 companies) during the 2023 AGM season.[282]

The significance of these figures is evident upon comparison. In the 2023 AGM season, the U.S. Russell 3000 companies received approximately 2.6 times the number of shareholder proposals per company,[283] and the approval/majority support rate of such proposals voted on was 2.5 times, compared to the equivalent Japanese figures. It is evident that both indicators demonstrate that, activism in the U.S. is more vigorous and has a greater impact on actual company operations than in Japan. However, there is a more notable implication: the difference in the influence of shareholder activism between the two jurisdictions is not as substantial as the frequently used global comparison metrics such as the number of campaigns suggest.[284] In particular, the proportion of resolutions passed or receiving majority support indicates the extent to which activism has brought concrete changes in company management through shareholder meetings. This finding suggests that global activism outside the U.S. might be more widely entrenched and have a stronger influence on company management than is generally thought.

## VI. CONCLUSION

92.pdf [https://perma.cc/DQB7-9H4A]; Usami et al., *Japan 2023 Proxy Season*, WHITE & CASE (Dec. 5, 2023), https://www.whitecase.com/insight-alert/japan-2023-proxy-season [https://perma.cc/U7BH-UNKU]. The total number of Japanese listed companies is 3,933 as of December 31, 2023. *See* JAPAN EXCH. GRP., *supra* note 161.

[281] Usami et al., *supra* note 279.

[282] *Id.*

[283] Calculated the percentage regarding Japan on the assumption that the number of Japanese publicly held companies is 3,933. This is the actual number as of December 31, 2023.

[284] *See infra* Figure A.

This Note conducted a comparative analysis of key legal frameworks governing director election contests, and the shareholder meeting outcomes in the U.S. and Japan. First, several significant systemic differences between the two countries have been revealed. While both nations have established proxy rules, the U.S. has been more proactive in enhancing shareholder rights than in Japan. Consequently, U.S. proxy rules are more comprehensive in scope and regulatory content, offering clearer but stricter regulations for those involved in proxy contests and ensuring more informed decision-making by Solicitees for votes than Japan. By contrast, in Japan, the combination of shareholder proposals and the written voting system has evolved into a unique system. This system resembles proxy solicitation in its function for the engagement with shareholders but can provide greater initiative for insurgents than the U.S.

Second, this Note demonstrated that these variations stem from key differences in (i) the operational modalities of shareholder meetings (predominantly proxy-based in the U.S. and largely in-person with direct shareholder engagement in Japan), (ii) the historical evolution and disparities in the systems of exercising voting rights (early embracement of proxy solicitation in the U.S. compared with preference for written voting systems in Japan), and (iii) the frequency and the extent of conflicts between corporate management and shareholders (U.S. conflicts have been among the most frequent in the world over a long period while traditionally fewer occur in Japan).

Third, analysis of the shareholder meeting outcomes through the lens of these similarities and disparities in both nations showed that proxy rules may not significantly impact or be neutral to the dissenting shareholders' decisions to enter into proxy contests, so long as such rules do not affect the Solicitors' costs. Although this argument warrants further empirical validation, it may advocate for more systemic reforms to require proxy contestants enhanced information

disclosure, considering the importance of private enforcement in the proxy solicitation system.[285]

With the increasing engagement and activism of shareholders in global capital markets[286] and new trends such as management's positive response to activist participation to promote management reforms,[287] it is evident that communication between management and shareholders is expected to become increasingly important.[288] In this context, if proxy solicitation becomes more common in Japan, this development could lead to changes in Japan's proxy rules. These changes may align the Japanese regulatory landscape more closely with the U.S. model. However, a more realistic prediction would be the opposite. That is, considering the current significant differences in the primary tools for exercising voting rights and their historical background,

[285] *See supra* Part IV.

[286] *Id.*; *see also* FTI CONSULTING, *supra* note 8; LAZARD, *supra* note 1.

[287] Makiko Yamazaki, *Nearly 70% of Japan Firms Expect More Activist Proposals*, REUTERS (June 22, 2023, 7:20 PM), https://www.reuters.com/sustainability/boards-policy-regulation/nearly-70-japan-firms-expect-more-activist-proposals-2023-06-21/; FTI CONSULTING, *supra* note 8, at 6; Mitsuru Obe, *Japanese Companies Embrace Shareholder Activism as Never Before*, NIKKEI ASIA (May 8, 2023,), https://asia.nikkei.com/Spotlight/Market-Spotlight/Japanese-companies-embrace-shareholder-activism-as-never-before (on file with Columbia Business Law Review).

[288] JAPAN EXCH. GRP., JAPAN'S CORPORATE GOVERNANCE CODE: SEEKING SUSTAINABLE CORPORATE GROWTH AND INCREASED CORPORATE VALUE OVER THE MID- TO LONG-TERM 3 (2021), https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj000004l0c.pdf [https://perma.cc/7GET-SWB7]; Matteo Gatti et al., *How Does Board-Shareholder Engagement Really Work?*, OXFORD BUS. L. BLOG (Nov. 28, 2022), https://blogs.law.ox.ac.uk/oblb/blog-post/2022/11/how-does-board-shareholder-engagement-really-work [https://perma.cc/VL36-2B5F]; Simon Grimes, *Six Guidelines For Successful Board-Shareholder Engagement*, FORBES (Mar. 17, 2023, 7:30 AM), https://www.forbes.com/councils/forbesfinancecouncil/2023/03/17/six-guidelines-for-successful-board-shareholder-engagement/ [https://perma.cc/T7XS-8SWW].

coupled with the higher cost associated with formal shareholder solicitation, it is expected that these practical trends will continue.[289] Consequently, reforms centered around written voting systems are likely to advance in Japan.

Here, one should note that "who controls a company is of great importance to" investors "as well as society" because "the value of company's assets depends significantly on who manages the company."[290] "[I]nvestments are increasingly organi[z]ed within so-called global value chains[.]"[291] Therefore, these systems will need to continue revisions that "facilitate beneficial control changes,"[292] taking into account global comparisons and adaptations.

While this Note primarily focused on the dynamics between the U.S. and Japan, there are insights applicable to other regions where activism is becoming increasingly prevalent.

[289] Due to space constraints, this Note was unable to address, but wishes to reserve, for another opportunity, (i) the exploration of what revisions could promote the use of the proxy system, and (ii) fundamentally, the normative significance of the shift to the proxy system from a corporate governance perspective.

[290] Bebchuk & Kahan, *supra* note 11, at 1077.

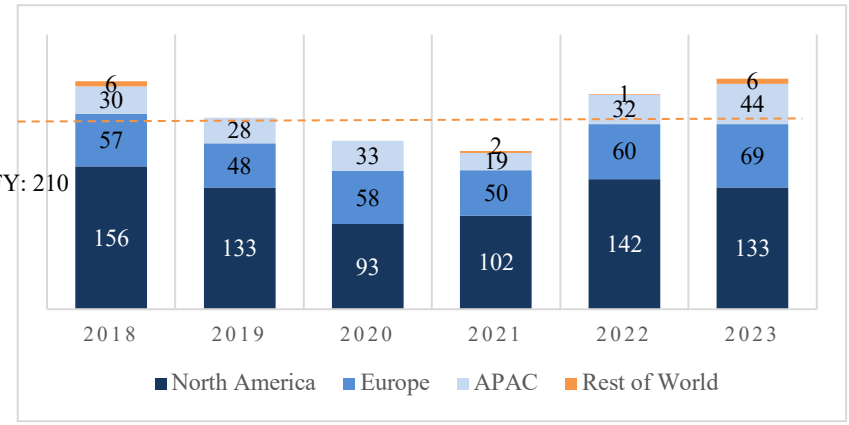
[291] Koen De Backer & Norihiko Yamano, *International Comparative Evidence on Global Value Chains* 3 (OECD Science, Technology and Industry Working Paper No. 03, 2012).

[292] Bebchuk & Kahan, *supra* note 11, at 1077.

# APPENDIX

*Figure A "Recent Trend in Global Campaign Activity"*[293]

*"Activist investors continued to stage more campaigns in 2023, coming within a whisper of the first year targeting more than 1,000 companies since 2019."*[294]

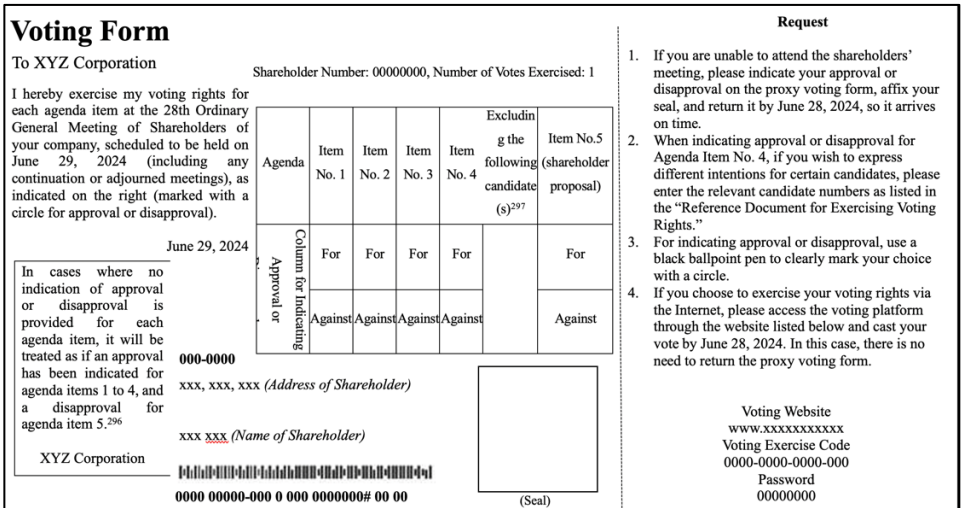



Note:
2023 global activity was up versus last year end reached a record high.
Europe and APAC were the largest contributors to the spike in activity, with each experiencing record numbers of new campaigns.

[293] Based on LAZARD, *supra* note 2.

[294] *Shareholder Activism Annual Review 2024*, DILIGENT (2024), https://learn.diligent.com/rs/946-AVX-095/images/Shareholder_Activism_2024.pdf?version=0 [https://perma.cc/D3TQ-SFMZ].

*Figure B "Sample Voting Form of Japanese Company"*[295]



**Voting Form**

To XYZ Corporation

Shareholder Number: 00000000, Number of Votes Exercised: 1

I hereby exercise my voting rights for each agenda item at the 28th Ordinary General Meeting of Shareholders of your company, scheduled to be held on June 29, 2024 (including any continuation or adjourned meetings), as indicated on the right (marked with a circle for approval or disapproval).

June 29, 2024

In cases where no indication of approval or disapproval is provided for each agenda item, it will be treated as if an approval has been indicated for agenda items 1 to 4, and a disapproval for agenda item 5.[296]

XYZ Corporation

| Agenda | Item No. 1 | Item No. 2 | Item No. 3 | Item No. 4 | Excluding the following candidate(s)[297] | Item No.5 (shareholder proposal) |
|---|---|---|---|---|---|---|
| Column for Indicating Approval or | For | For | For | For | | For |
| | Against | Against | Against | Against | | Against |

000-0000

xxx, xxx, xxx *(Address of Shareholder)*

xxx xxx *(Name of Shareholder)*

0000 00000-000 0 000 0000000# 00 00

(Seal)

**Request**

1. If you are unable to attend the shareholders' meeting, please indicate your approval or disapproval on the proxy voting form, affix your seal, and return it by June 28, 2024, so it arrives on time.
2. When indicating approval or disapproval for Agenda Item No. 4, if you wish to express different intentions for certain candidates, please enter the relevant candidate numbers as listed in the "Reference Document for Exercising Voting Rights."
3. For indicating approval or disapproval, use a black ballpoint pen to clearly mark your choice with a circle.
4. If you choose to exercise your voting rights via the Internet, please access the voting platform through the website listed below and cast your vote by June 28, 2024. In this case, there is no need to return the proxy voting form.

Voting Website
www.xxxxxxxxxxx
Voting Exercise Code
0000-0000-0000-000
Password
00000000

*Sample Agenda Items and Method of Indicating Approval or Disapproval on Voting Form on a Case-by-Case Basis*[299]

[295] Shareholders are required to fill in the necessary information on this document and submit it (by mail) to the company.

[296] Shareholders are required to fill in the necessary information on this document and submit it (by mail) to the company.

[297] It should be also noted that in cases where no indication of approval or disapproval is provided, different treatments are applied for company (board of directors) proposals (Agenda Items 1 to 4) and shareholder proposals (Agenda Item 5).

[298] As for Agenda Item No. 4 (which pertains to the appointment of directors), a provision for indicating approval or disapproval for each candidate is facilitated by the inclusion of the item "Excluding the following candidate(s)."

[299] *See* Japan Exch. Grp., Templates for Various Corporate Documents under the Companies Act Enforcement Regulations and the Corporate Accounting Rules 131 (Rev. Ed. 2022).

■ **Case 1: In the Case of Shareholder Proposals Submitted - Director Contest Situation**

**Example of a Proxy Voting Form (For Director Election Proposals, Including the Maximum Number of Directors as Specified in the Articles of Incorporation):**

[Example of Description]

**Instructions for Shareholders:** Please indicate your approval or disapproval in the following columns (mark with a circle).

| Proposal | Agenda Item No. 1 | Agenda Item No. 2 | Excluding the Following Candidates |
|---|---|---|---|
| Company Proposal | For | For | |
| | Against | Against | |

| Proposal | Agenda Item No. 3 | Excluding the Following Candidates |
|---|---|---|
| Shareholder Proposal | For | |
| | Against | |

*Please Note: The board of directors opposes the shareholder proposal. As per Article xx of our Articles of Incorporation, the number of directors of our company is limited to xx. Therefore, if there are more than xx approvals in total for the director candidates of Agenda Items No. 2 and No. 3, which cumulatively have xx candidates, the exercise of voting rights for both these agenda items will be treated as invalid. If there is no indication of approval or disapproval for an agenda item, it will be treated as if an approval has been indicated for the company's original proposal and a disapproval for the shareholder's original proposal by the company.

■ **Case 2: In the Case of Shareholder Proposals Submitted – Other Contested Situation**

[Example of Description]

**Instruction for Shareholders:** Please indicate your approval or disapproval in the following columns (mark with a circle).

| | | | |
|---|---|---|---|
| **Agenda Item No. 1:** | **For the company's original proposal:** | For | Against |
| **Agenda Item No. 2:** | **For the company's original proposal:** | For | Against |
| | **For the shareholder's original proposal:** | For | Against |
| **Agenda Item No. 3:** | **For the shareholder's original proposal:** | For | Against |

*Please Note: If no indication of approval or disapproval is given for an agenda item, it will be treated as if an approval has been indicated for the company's original proposal and a disapproval for the shareholder's original proposal.

*Figure C "Number of Japanese Listed Companies Receiving Shareholder Proposals (1983-2023)"*[300]

[300] Created using data from DAIWA INST. RSCH., *supra* note 279, and white papers prepared by Shoji Homu for each year. *See, e.g.*, *Shareholders' Meeting White Paper*, *supra* note 73. Additionally, the number of companies that received shareholder proposals has been increasing year by year: 65 companies at the shareholders' meetings held in 2021 (from July 2020 to June 2021), 96 companies at the shareholders' meetings held in 2022 (from July 2021 to June 2022), and 90 companies at the shareholders' meetings held in 2023. These statistics are based on various editions of Watanabe et al., *supra* note 53, and Usami et al., *supra* note 279.

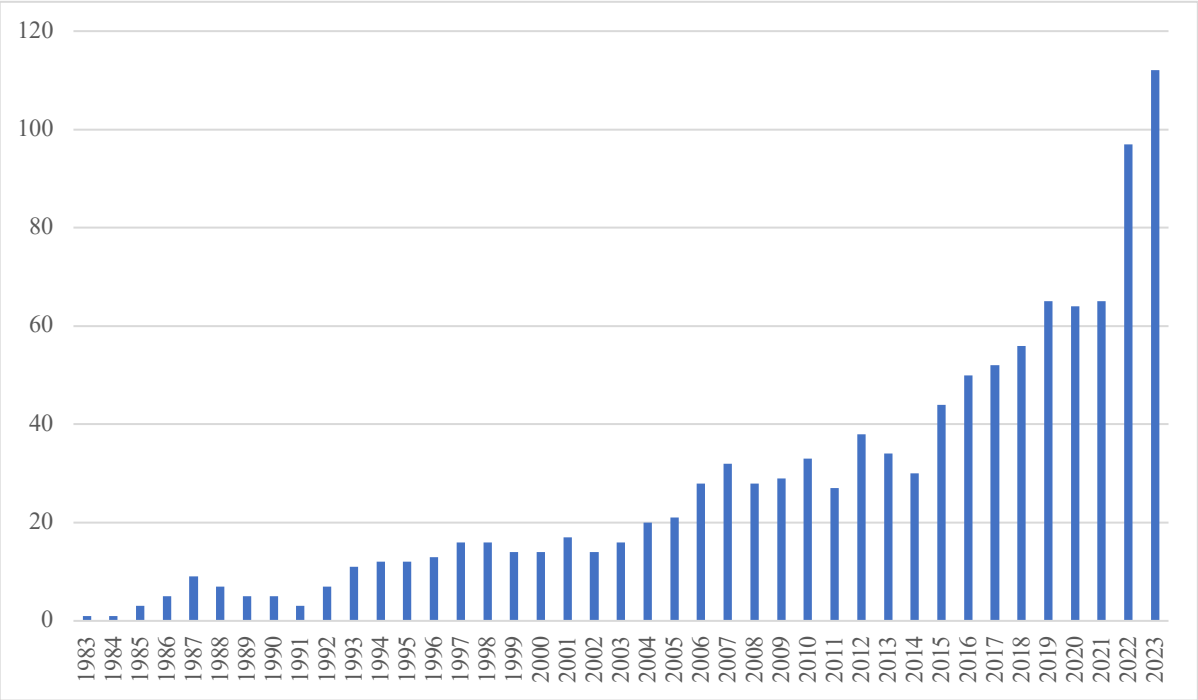
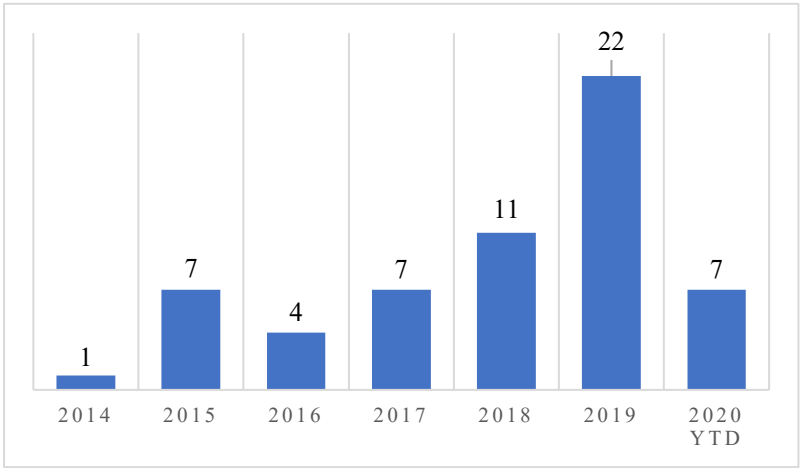



*Figure D "Recent Trend in Japanese Board Campaigns"*[301]

[301] *Shareholder Activism In Japan*, ACTIVIST INSIGHT, at 9 (May 2020), https://www.activistinsight.com/research/ShareholderActivismInJapan.pdf [https://perma.cc/JXZ4-5SNP].




*NOTE*
Since the table above is based on the data as of May 2020, the total volume of director campaigns happening in 2020 may be higher than seven (7).