



## SEC Reporting & Compliance and Corporate Governance Series

# Navigating the Current Landscape of Shareholder Activism

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On March 28, 2018, Skadden hosted the webinar “Navigating the Current Landscape of Shareholder Activism,” the fifth and final program in the 2017-18 SEC Reporting & Compliance and Corporate Governance Series. The panelists were Skadden M&A partners Richard Grossman and Martha McGarry; Matthew Sherman, president of Joele Frank; Greg Taxin, managing director at Spotlight Advisors; and Scott Winter, managing director at Innisfree M&A Incorporated.

### Current Trends in Shareholder Activism

Mr. Grossman began the discussion with some observations about current trends in shareholder activism, including increased activism in Europe and Asia and more widespread acceptance of activist tactics across global markets. Mr. Grossman also discussed the re-engagement of prominent activists in the second half of 2017 and 2018, following a retrenchment in 2016 and the first half of 2017 after steep losses in 2015. Mr. Grossman noted that as activists pursue larger and better-resourced targets, companies have shown an increased willingness to fight back against activists.

Mr. Taxin provided insights on the rise of “reluctivists,” or traditionally long-only institutional investors who are increasingly engaging in activist campaigns, and commented on the ubiquitous use of activist tactics by various investors. He noted, “Anyone can be an activist now.”

Mr. Winter discussed institutional investors’ increased focus on environmental, social and governance matters, including climate change and board diversity proposals. He remarked that while governance issues such as shareholders’ ability to call special meetings and act by written consent remain hot topics, environmental and social issues are gaining prominence. Mr. Winter said that institutions’ support for climate change proposals at various issuers ultimately is about risk management and ensuring that issuers are considering how the environment could negatively impact their businesses.

Mr. Sherman next commented on the successful patterns of pressure that activists often exert on their targets, including their use of the media as a low-cost megaphone. Mr. Sherman also noted that activists continue to do in-depth research and analysis on a company and its industry prior to surfacing in order to lay the groundwork well in advance of launching a proxy contest. Moreover, Mr. Sherman said an activist will often canvas a targeted company’s shareholder base, which may provide companies that have strong shareholder relationships advance notice of an activist “poking around.”

# Key Takeaways

## Navigating the Current Landscape of Shareholder Activism

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### Preparing for and Responding to Activists

Ms. McGarry then weighed in on certain financial vulnerabilities (including, among others, stock price performance, capital allocation policies and a company's business strategy) that could make a company more susceptible to being an activist target, noting that while governance vulnerabilities tend to be used to bolster activists' arguments with institutional investors, activists primarily target companies based on its operational performance. Ms. McGarry stated that many of her clients conduct vulnerability self-assessments to anticipate and pre-empt activist attacks, and assemble an internal activism response team and external advisers in advance of any activist surfacing.

Mr. Winter mentioned that maintaining a "stock watch" program can help detect activist accumulations of stock in advance of an activist filing a Schedule 13D or 13F.

Ms. McGarry then provided an overview of directors' fiduciary duties in the face of an activist's demands and stated that under Delaware law, boards generally have wide latitude in responding to activists as a result of the business judgment rule.

### Meeting With Activists

Ms. McGarry stated that she advises companies to engage with an activist, and provided advice on such meetings, including that any such meeting is not confidential and therefore, statements made may be used by the activist without any context later in a campaign. She also cautioned companies to be mindful of Regulation FD. Mr. Taxin said independent directors are increasingly participating in such meetings, especially when an activist's thesis involves management change. Mr. Sherman noted that companies should be primarily in "listening mode" during the initial meeting with an activist.

### Shareholder Composition and the Role of Proxy Advisory Firms

Mr. Winter discussed the role of shareholder composition in a proxy contest and how proxy solicitors help companies understand and engage with their shareholder base. Mr. Taxin explained Institutional Shareholder Services' analytic frame-

work for minority and control proxy contests, and expressed his view that the firm disproportionately supported minority representation on boards.

### Settlement With Activists

Ms. McGarry discussed certain considerations that companies consider before deciding whether to settle with an activist. Mr. Taxin reflected on increasing backlash from institutional shareholders who have become wary of some companies' practice of rushing to settle with an activist. Mr. Sherman provided key insights on critical messaging when announcing a settlement with an activist.

### Activists in the Boardroom

Ms. McGarry advised that companies should update their director policies prior to an activist joining the board, including those related to confidentiality of board discussions and director access to management. Ms. McGarry also discussed potential conflicts of interest that may arise for directors who are principals or employees of an activist fund and potential solutions that include disclosure of such interests, recusal and the use of special committees. Mr. Taxin noted the difference between activist-nominated directors who are principals or employees of an activist fund and those who are independent of such funds.

### Shareholder Engagement and Developing a Communications Plan

Messrs. Grossman and Winter noted that companies are increasingly engaging with investors on a year-round basis and that building credibility with shareholders in advance of an activist surfacing is vital to winning a proxy contest. Mr. Sherman stated that many companies work with their external advisers and directors to develop a "playbook" with contingency plans and responses to a potential activist campaign. Mr. Sherman also reiterated that a company's best defense against an activist is a good offense: In advance of the activist's surfacing, the company should effectively communicate the company's strategy and performance, and proactively address shareholder concerns and issues raised by sell-side analysts.