Hybrid Panel Discussion

Shareholder Engagement: State of Play

September 11, 2025

Key Takeaways

The Society for Corporate Governance, in collaboration with Kirkland & Ellis LLP, convened a hybrid panel discussion on **Shareholder Engagement: State of Play** on September 11, 2025, at Kirkland & Ellis's New York offices and via Zoom. The session brought together approximately 80 in-person attendees and 180 virtual participants to help members prepare for the 2026 proxy season in light of evolving institutional investor engagement practices, recent SEC guidance on shareholder engagement, and activist responses to the changed environment.

The panel was led by **Christina Thomas**, Partner, Capital Markets, Kirkland & Ellis LLP (moderator), and included **Lauren Gojkovich**, Founder & Managing Member, LDG Advisory, LLC; **Cristiano Guerra**, Partner, Strategic Governance Advisors; **Alvin Huntspon**, Global Head of Governance Strategy & Engagement, Uber; **Shaun Mathew**, Partner, Shareholder Activism and Hostile Takeover Defense, Kirkland & Ellis; and **John Roe**, Global Co-Head, BlackRock Investment Stewardship.

The discussion highlighted that, in light of the SEC's guidance on shareholder engagement, corporate management will need to take a more active role in reaching out to institutional investors, setting the agenda for engagement meetings, inviting input within the bounds of regulatory guidance, employing other methods beyond direct shareholder engagement to assess investor sentiment, coordinating and sharing information between the IR and governance teams, and keeping their boards informed of what they learn.

Below are the key takeaways from the session. *These takeaways are not, and should not be construed as, legal advice.*

Purpose of Shareholder Engagement

- **Shareholder engagement serves multiple strategic purposes.** For major institutional investors, engagement is primarily a tool for gathering information not captured in filings or public disclosures, helping them understand the full context of issues on the ballot. It also lets investors gauge a company's position on emerging topics (e.g., AI) and evaluate whether practices are strong, adequate, or need improvement. Another goal of engagement is to encourage reflection among management and boards, sparking discussion on their practices or competitors' approaches. Importantly, engagement is not intended to influence company strategy, financial decisions, or policy advocacy – those remain the board's and management's responsibilities.

- **Year-round shareholder engagement strengthens corporate governance, strategy, and transparency.** Ongoing dialogue lets management and boards incorporate shareholder feedback into decisions and disclosures, while also allowing boards to clearly tell their story, giving shareholders insight into how and why key choices are made. Proactive engagement builds trust, fosters stronger relationships, and keeps corporate leaders and investors alike informed of evolving governance practices and business issues.

- **Investors value seeing directors unscripted.** In contested situations, directors with over-rehearsed talking points and lengthy Q&A preparations inhibit investors' understanding of genuine board dynamics. Some investors ask questions that go "off script" to get a better understanding of how directors approach their roles. These insights into how boards operate in their natural state provide critical information for evaluating governance strength and director suitability.

Impact of the SEC's "Passive Investor" Guidance on Shareholder Engagement

- **The SEC's passive investor guidance has reshaped engagement, although the impact has varied by asset manager and company.** Issued in February through new and updated Compliance & Disclosure Interpretations (C&DIs) (103.12 and 103.11, respectively), the guidance clarified when an investor is eligible for reporting on Schedule 13G (passive investor status) versus Schedule 13D (active investor status). Previously, based on the former C&DI 103.11, engagement on topics such as ESG, staggered boards, poison pills, or executive pay was not deemed inconsistent with 13G status. Under the new guidance, generally, an investor who describes its views and how it may inform voting decisions, without more, can still use 13G. The guidance cites examples (such as the investor recommending that the issuer remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake specific actions on a social, environmental, or political policy) in which an investor steps over the line into 13D territory if exerting "pressure" on the issuer by implicitly or explicitly tying corporate action to a vote in favor or against one or more of the company's director nominees in the next election. Commissioner Uyeda, at the Society's 2025 National Conference, stated that, in his opinion, the concept of "control" can extend beyond an explicit or implicit threat to vote against directors.

- **The guidance's impact on companies is mixed.** According to a recent Society survey, of those who have engaged with investors since the issuance of the new guidance, 45% of companies have not experienced meaningful change in their engagements, while 30% indicated the experience has worsened or become more challenging, and 25% noted significant variation depending on the investor. No respondents reported improvements.

- **Some investors have responded to the "gray zone" created by the guidance by reassessing engagement practices and introducing updated protocols.** The approaches have included discontinuing proactive outreach to companies (but still meeting if requested by the company). Others have changed the protocols during engagement – ranging from being in "listen-only mode" to continuing to engage in a two-way discussion but only if the issuer "opens the door" to the topic. More generally, investors have added disclaimers at the start of meetings to stress they are not exerting control and no longer signal voting intentions during discussions. Because engagement remains a valuable resource to investors and issuers alike, companies are encouraged to continue initiating discussions and to proactively raise sensitive issues rather than waiting for investors to raise them – though the depth and quality of feedback can vary across the shareholder base, and some investors may withhold their views altogether.

- **Contested situations are considered a carve-out from general engagement rules.** Investor practices in proxy contests are largely unchanged. Contrary to some issuers' expectations, the SEC's guidance has not led thus far to a tilted playing field in which activists have greater access to institutional investors than that available to issuers. Some investors follow a "three bites at the apple" approach, speaking to each side up to three times. The first conversation occurs before proxy advisors release their recommendations, providing an early understanding of each side's perspective. The second – typically about two weeks before the vote – is the most substantive, allowing a deep dive into nominees, proposed changes, settlements, and any developments that have occurred. The third is an optional final check-in for questions that emerge late in the process. Across all conversations, investors may avoid revealing voting decisions in advance of the meeting, while still allowing robust dialogue.

Activism Preparedness

- **Activism preparedness requires engagement well beyond the final push before a vote.** While the month before an annual meeting is often the focus, companies must also engage at other times. Once an activist surfaces, management and boards must quickly gather accurate shareholder perspectives to assess activist claims and the company's potential leverage in settlements or proxy fights. Off-season engagement is equally important, serving as a "canary in the coal mine" for concerns before they escalate. Issuers need to avoid waiting until the commencement of an activist campaign before engaging with institutional investors.

- **The corporate secretary and investor relations (IR) teams must collaborate closely to ensure boards do not hear shareholder critiques for the first time during an activist campaign.** Corporate secretaries play a critical gatekeeping role, ensuring board materials capture issues and shareholder feedback – including insights from portfolio managers and analysts – and must work in lockstep with IR so directors receive a complete and timely view of shareholder perspectives. This alignment enables boards to understand long-term performance trends, anticipate risks, and stay ahead of potential issues before they escalate.

- **Proactive preparation and specialized advisory teams are critical in contested situations.** In proxy contests or activist scenarios, experienced advisory teams help boards anticipate potential vulnerabilities, understand shareholder perspectives, and navigate the strategic and operational implications of the situation. Well-prepared directors can clearly explain their decision-making process and control the company narrative while responding effectively to shareholder questions and concerns.

<u>What to Expect This Coming Proxy Season</u>

- **Companies should consider reassessing engagement strategies and exploring alternative ways to gauge investor sentiment ahead of the 2026 proxy season.** Many companies are still deciding whether to adjust their approach to shareholder engagement given that some investors may choose not to engage or engage in a more limited manner. To supplement shareholder engagement, companies should, at a minimum, pay close attention to proxy voting policies and practices to understand investor expectations even in the absence of direct engagement. Companies can supplement traditional engagement channels with third-party investor perception surveys and other tools to understand shareholder perspectives.

- **Governance failures can still trigger investor scrutiny even from long-standing or historically supportive shareholders.** Serious or persistent governance issues can spark campaigns or votes against the board, regardless of past relationships. Companies cannot rely on historical investor behavior or voting patterns; continuous monitoring of governance practices and proactive remediation are essential to reduce the risk of surprises during the upcoming proxy season.

- **Engagement strategies must be differentiated and context-specific.** Investors evaluate governance, board composition, and long-term value creation in different ways. Assuming uniform investor behavior leaves companies exposed. Tailored engagement approaches help build stronger relationships and reduce risks from activist or governance-driven campaigns.

Conclusion

Companies are in the driver's seat when it comes to shareholder engagement. They must take ownership of assessing their own vulnerabilities, proactively understanding investor priorities and policies, and developing new approaches to shareholder engagement and otherwise assessing investor sentiment. Companies should be prepared to not only request the meeting and set the agenda, but to take the lead in the dialogue while looking for opportunities to elicit input. Close collaboration between corporate functions – especially the corporate secretary and IR functions – and the board is essential to ensure the company has a comprehensive view of potential risks and investor concerns. By taking the initiative and not waiting to hear from (or receive negative votes from) major institutional investors, companies can anticipate challenges in a timely manner, build stronger shareholder relationships, and navigate the upcoming proxy season with confidence.

More on shareholder engagement

Society public company members across sizes responding to a recent benchmarking survey provided insights on how companies are navigating recent developments in shareholder engagement and planning for what's ahead. These insights helped inform this panel discussion and provide valuable benchmarking information for companies to compare their practices with those of their peers.

Among the key takeaways:

- Of those companies represented by respondents that have engaged with investors since the SEC's issuance of the new 13G guidance in February, a plurality (45%) indicated investor engagements have not meaningfully changed, while 30% of companies reported the experience has worsened or become more challenging, and 25% noted it has varied significantly by investor. No companies reported an improvement.

- When asked whether their company plans to proactively adjust its approach to shareholder engagement meetings for the upcoming proxy season, 42% of respondents said no, 17% indicated yes, and 22% said they are considering it.

- The vast majority of companies (80%) are not planning on making any governance-related changes (e.g., changes related to its governance structure, policies, and/or practices) in response to shareholder concerns ahead of the upcoming proxy season, while 5% are making changes, and 8% are considering changes.

- Just over half of respondents (52%) reported that their current company – or companies they have been associated with previously – has ever encountered demands from an activist hedge fund, whereas 47% have not. Among those saying yes, most situations escalated publicly.

- The majority of respondents (54%) believe their company has not become more vulnerable to activism or an unsolicited bid since the beginning of this year, while 26% view it as somewhat more vulnerable, and 19% as more vulnerable.

- Among those companies that have a “shelf” poison pill or other defensive measures, most (~74%) are not planning to, nor currently discussing, updates, while 13% are, and 11% are unsure.

About the Society for Corporate Governance

The Society is a professional membership association of more than 3,700 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,700 entities, including approximately 1,000 publicly held companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance, disclosure matters, and mergers and acquisitions.

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