

## **NACD PROGRAM**

**May 18, 2017**

### **Activist Investors 3.0: Practical Tips for Effective Board Engagement**

On May 18, the Chapter hosted the third in its series of programs covering issues raised for boards of directors as a result of shareholder activism. The program was constructed by Chapter sponsor PwC. It presented two video fact situations that called for reactions from attendees seated at individual tables, who then were asked to report a summary of the table discussions to the group as a whole. Facilitating the learning process were Paul DeNicola and Leah Malone, from PwC's Governance Insights Center, and Jean-Rene Gougelet, CEO of Casabella Holdings and NJ Chapter Board member.

Mr. DeNicola and Ms. Malone began by identifying various current shareholder activism trends:

- Activists are now attacking the competence of CEOs directly, not just the strategy a company is implementing.
- Activists are pressing for the ability to communicate directly to board members, not through intermediaries.
- Board composition is increasingly in the spotlight. Are the right skill sets for the company represented on the board?
- Activists care little about long term results. Their time horizon tends to be 18 months or less.
- There were 316 activist campaigns in 2016, comprising 1 out of 5 S&P companies. 58% of activists' demands were met. A "stiff arm" response to activist demands no longer seems viable.
- 2016 saw a record number of campaigns that descended into an actual proxy fight, with activists winning 56% of those. The average cost of conducting a proxy fight has risen to \$1.9 million.
- In 2016, 127 board seats were turned over to activists.

The key to successful defense against activists is planning in advance. Practical tips for boards identified at table discussions included the following:

- The board starts in a "one down" position. Activists can say to the market anything they want, but targets are boxed in by requirements for fair disclosure imposed by SEC regulations. This puts a premium on accurate and clear communications. As activists try to "cherry pick" the board, the board needs to be mindful of communicating with one voice, who should be identified in advance.

- Activists look solely at market price. Boards should aggressively make the case that price is not the same thing as value and needs to be measured on a long term basis.
- The board should make every effort to preempt activists by eliminating in advance any structural weakness that might attract them. Such weaknesses could include: rapid and excessive director turnover, no coherent corporate strategy, no term limits for directors, or a classified board.
- The board should have in place a defense team of advisors they can rely on should a fight break out. These would include lawyers, investment bankers and others on retainer who would be conflicted if activists seek to hire them to conduct the fight.
- The board should have a thorough understanding of guidelines the proxy advisors will follow in deciding whether to recommend support for management.
- Communications should include a social media component mainly targeted to retail investors, whose support in a fight may prove to be critical.