



Living with Activist Nominees on Your Board

The Chicago NACD's 2016 – 2017 season continued with a panelist discussion moderated by Beth Peev, Partner of Sidley Austin LLP. Panelists Shan Atkins, Managing Director and Co-Founder of Chetrum Capital LLC; Sam Scott, Former Chairman, President and Chief Executive Officer of Ingredion Incorporated; and Paul Williams, Partner of Major, Lindsey & Africa and Managing Director of Allegis Partners LLC shared with the audience their experiences and insights gained from serving alongside activist-nominated directors on their boards.

Paul Williams, in his role as President-Elect of the NACD Chicago Chapter, kicked off the program by welcoming the audience and asking Peev and his fellow panelists to introduce themselves. Peev, who advises the boards of private and public companies on shareholder activism, then invited the audience to participate throughout the discussion by jumping in with questions. The panel and audience mainly focused the discussion around tactics to ensure a productive board room dynamic after activist nominees join.

Peev kicked off the discussion by asking Williams to share how the board dynamics changed when four nominees joined one of his boards after a proxy fight. Williams shared that while the start was a bit rocky (the activist had intended to replace the entire board and during the proxy fight had made deeply personal attacks against each director), the board changed for the positive as the nominees were truly independent of the activist. Williams also credited the Lead Independent Director for building a cohesive board; the Lead Director knew the board needed to move forward and was extremely gracious towards the activist nominees. Atkins, who has both served as an incumbent director and an activist nominee, also emphasized the importance of understanding whether the activist nominee is truly independent. She shared that of the five activist nominees who joined the Pep Boys Board, only three of them were truly independent and was voting in the company's best interest versus simply with the activist. Atkins further shared that the activists did improve the candor and transparency of the board; the activist at Pep Boys was mostly constructive and very data driven.

Scott further highlighted that activists are not only extremely focused on data but they also have more data than the rest of the board. He shared his experience from one of his boards, where one of the activist nominees was a principal at Trian. During the meeting, the principal would be typing away at his computer requesting data that would then instantaneously be sent to him from the team of analysts or researchers at Trian; the difference between the activists and the rest of the board was the activists had the resources to pull every single data point they needed. Scott and the board went back to the company and asked for more information; without it, they would not be able to support their points or question the activists. Understanding that requests from the activists and board could be cumbersome to the company, an audience member asked how the board protected management from overbearing requests. Atkins shared that establishing a process was especially important; at

Pep Boys, the board agreed to a call with management to go through the monthly operations package. The board had previously not received this level of detail and Atkins shared that, ultimately, it was useful and allowed the board to become more engaged. The activist also requested weekly calls or meetings with the CEO, but the board stepped in and stopped the overly intrusive activity. Scott followed up, sharing that the best method of stopping an activist from overstepping the boundaries is to make a case that it was disrupting the business. Specifically, he asked the rhetorical question of, "If we are trying to cut costs, then how do we justify adding five people to corporate staff to provide the financial data that is being requested from the company?"

The discussion moved from how an incumbent board incorporates activist nominees on the board to how to an activist nominee smooths the relationship with management and other board members. Atkins, who currently serves as an activist nominee on the Darden Board shared that she and the other directors (the activist replaced the entire board) reached out, held meetings with key individuals at the organization, and strived to show the company that the board wanted to listen and add value. She shared one of the things the new board did that was unusual was have each director work a full day at a local restaurant. This, along with actions such as attending company-hosted events helped the company understand that the board was willing to engage and add value.

Finally, to wrap up the conversation, Peev asked the panel to share one piece of advice regarding guarding against or working with activists. The panel emphasized the importance of engaging with the activists as soon as they call or show an interest; it is much better to speak with them than to have them engage through the press. Additionally, get to know your shareholders and be your own activist; the best way to protect against an activist is to ensure the company is running correctly already. Peev concluded with, "If you want the activist nominees to behave like a director, then treat them like one."