

Should an activist be allowed to address the board?

Keep your friends close and your activists closer. **By Jeremy Jacobs**

Jeremy Jacobs is a managing director at the strategic communications firm Abernathy MacGregor, frequently advising management teams and boards during times of transition.

The communications role of the corporate board and its members in shareholder activism has long been a challenging one.

Should the professional managers in the C-suite, appointed by the board and involved in the company's affairs on a daily basis, be the sole communications channel with activists? Or should directors meet with activists who may potentially seek to oust them for perceived failures?

This perennial question is taking on a greater urgency due to the remarkable increase in activism during the past decade as well as changes in how investors regard their level of engagement with the companies they own.

Activists thrive when communication breaks down between company leadership — includ-

ing the board — and the shareholders whose interests they are expected to advance. The job of communicating with activists primarily belongs to the same professionals and subject matter experts — the IRO, CFO and, when appropriate, CEO — who ordinarily manage investor communications. However, when corporate governance is specifically at issue, it is sometimes reasonable and necessary for members of the board to step forward.

Clearly not every activist requesting a meeting should get one. Boards should consider the size and length of the holding, the activist's track record of constructive engagement at other companies, and whether the activist has already exhausted other, more standard, channels such as speaking with the CFO or CEO. And a meeting is certainly more advisable if the board already believes the activist's strategy is worth serious consideration. But in certain instances, a case can be made for "keeping your enemies closer" even if the company and board view the activists as counterproductive to their strategic plan for the business.

Meeting with the activist gives the board a chance to hear assertions and demands, without them being filtered by management. The board can gauge first-hand whether the activist would be a valuable addition to the boardroom, or just a distraction. Engaging directly with activists also enables boards to demonstrate that their commitment to good corporate governance is more than just words. We have found concerned investors often are reassured when they see and hear from an engaged board. Usually activists are looking to effect change, not just engage in a fight. If sensible activists meet with a board that credibly shows it is receptive to new ideas, well versed in the



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strategies and initiatives underway at the company, and/or resolute in its support of the current strategy, they can sometimes be dissuaded from public agitation.

That is, however, a big “if.” Not all activists are sensible, and not all board members are equally credible. Some directors recoil from the notion of sitting through an activist’s lengthy presentation and others feel uncomfortable communicating about company strategy. Each situation is different and must be evaluated on its merits, but there can be times when being receptive to an activist presentation can establish a track record of openness that will be useful if the situation devolves into a public fight.

Additionally, management teams engaged with activists increasingly report that they have gleaned new information on investor perceptions of their own company as well as new perspectives on the competitive landscape. While allowing activists to address the board does not always foster a constructive conversation, and can be the wrong decision based on the considerations above, there are times too when refusing to meet hands a cudgel to the activist which they can use to beat the board.

Before any engagement takes place, there are other considerations to be weighed, including whether it should be a full meeting of the board and, if not, which directors should attend. Rather than a large, formal meeting, many companies would be better served by suggesting a smaller and less formal meeting, attended by one or two thoughtfully selected directors who are accustomed to dealing with shareholders (like a former CEO) and/or knowledgeable about the subject matter most relevant to the activists (e.g., the head of the compensation committee if executive pay is at issue).

Another common question is whether directors should meet the activists without the CEO

present. Most CEOs are leery of permitting an activist to meet the board without being in the room themselves, but when governance issues are being questioned, a strong case can be made that the CEO should not attend.

These considerations shouldn’t wait until an activist requests a meeting. Forward-thinking boards use “peacetime” to develop a clear policy regarding shareholder requests to meet with the board, and identify in advance who will be the appropriate board representatives if the opportunity arises. These steps constitute part of a broader review of activist preparedness, and of the board’s direct engagement with shareholders outside the confines of activism.

Ongoing shareholder engagement effectively demonstrates a genuine commitment to good governance and shareholder value, to learning about and addressing investor concerns head-on, and to ensuring the financial community understands and embraces the strategic direction the board has set in conjunction with management. All of this can deter activists from targeting a stock, and help defeat them if they do. Regular contact with investors also can provide directors with a baseline for measuring the validity of an activist’s critique. Again, though, clear policy and protocols established in advance and employed consistently are far preferable to ad hoc responses.

In any meeting with shareholders — activist or not — the board members involved should go in with clear goals for the discussion, a clear understanding of what messages they would like to convey and what they would like to learn from the other party. Clarity and consistency on the part of a board provide a greater likelihood of genuine engagement and a beneficial outcome for the company and activist alike. ■

The author can be contacted at jjj@abmac.com.