

Directors & Boards

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BOARDROOM BRIEFING
M&A AND THE BOARD



Who speaks for the board?

*In search of the board's 'voice'...
and whether it should have one.*

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Who speaks for the board?

Asked another way, should the board have its own 'voice'? Here is what we learned when we went in search of a 'new normal' best practice that boards should consider adopting.

LAST NOVEMBER the *Wall Street Journal* reported that new CEO Robert Benmosche was threatening to quit, and that the AIG board was scrambling to salvage the situation. A fairly momentous development, considering the still precarious state not only of AIG but of the broader financial community and markets. Asked what was happening at the board level, this is what ended up in the article: “A spokesman for the giant insurer said the company doesn’t comment on board activities.”

Well, okay.

Then, next question: Who does speak for the board?

The reality is, in many if not most circumstances, no one seems to. Boards simply have no voice of their own.

That has been the longstanding tradition — that the corporation speaks with one voice, that of management’s.

Is this still a good thing? Is this responsible behavior for boards in today’s environment of fuller transparency and dis-

closure — to have no voice of their own? And, if they were to find their voice, whose voice should it be? And how should it be expressed? Should a board have its own ongoing PR counsel, just as many are now doing in hiring their own independent compensation advisers?

For answers to these questions, *DIRECTORS & BOARDS* turned to expert voices in the governance advisory, investment, and corporate communications community, as well as among sitting directors. In the following roundup, you will find a surprising unanimity of opinion on several dimensions of the topic, including staunch defenders of the “one voice” principle, but you will also be given pointers on being responsive to the demands of a new age of disclosure — a “show me” and “tell me” era in which boards not only have to exercise superb oversight but must give greater confidence that they have done so.

— James Kristie

Expectations have changed

Just don't let the dire past predictions come back to haunt the board.

BY JAY W. LORSCH

IN CONSIDERING who should speak for the board, it is necessary to address first the matter of should boards make public pronouncements at all. Traditionally, in most public companies, management has spoken for the company (and implicitly for the board). All concerned (top executives and board members) believed this was safer. After all, directors were part-timers with limited knowledge, and therefore might not be able to make thorough or coherent pronouncements or might make misstatements and, further, would not be able to answer questions about their statements. Even worse, if more than one director commented on the same

matter, they might express different opinions, leaving the impression the board was confused or, even worse, in a state of disagreement.

But expectations of boards have changed in recent years. Today boards are expected by shareholders and others to have a voice and to offer their views on company matters. For example, board compensation committees are required by the SEC to discuss their decisions about executive compensation in the CD&A in their company’s 10-K. If boards replace a CEO, they are expected to explain their decision publicly. At shareholder meetings, board chairs (even if they are not the CEO) are expected to comment on the board’s activities and even company results.



As this latter example suggests, the most obvious person to speak for the board is its chair. Of course, if the chair and the CEO are the same person, then the board's spokesperson might be the lead (or presiding) director. If the issues are relevant to the activities of a specific board committee, e.g., audit or compensation, then the spokesperson would logically be the chair of that committee.

Whoever it is that speaks for the board has an obligation to be certain that the views expressed are consistent with those of other board members and also that management is aware of the position that is going to be expressed. Any disagreements

must be resolved within the board or between the board and management before public statements are made. Otherwise the dire past predictions about the dangers of boards taking positions could return to haunt a board.

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Five suggestions to give directors a voice

Until boards have greater freedom to speak on their own behalf, relations with shareholders will continue to be adversarial. **By John C. Wilcox**

It is time to take the wraps off corporate boards. Corporate governance standards developed over the past 20 years have amplified the board's powers and responsibilities and increased the need for better communication. Directors are now so carefully scrutinized and so closely identified with their companies' economic performance that the traditional mode of closed-door, no-questions-asked decision making is no longer acceptable. Boards need greater freedom to communicate beyond the dictates of disclosure and explain how their policies and decisions relate to the strategic goals of the company.

Here are five suggestions to give directors a voice and open a window (not a door) into the boardroom without sacrificing collegiality, confidentiality, or competitive position:

1. Create a board equivalent of the MD&A. An annual "Directors' Discussion & Analysis" should deal with the board's governance processes, policies, decisions, and oversight responsibilities. The DD&A should be constructed around written reports from each of the board's standing committees supplemented by a forward-looking strategic overview that links board practices to the achievement of business goals. The DD&A could be published in the proxy statement (a safe harbor might be needed), in the annual report, or on the company's Web site.

2. Resurrect the annual Board Compensation Committee Report. Executive compensation



is the board's responsibility and is viewed as a key indicator of directors' independence, competence, and focus on performance. The current CD&A, a management document, is no substitute for a substantive discussion of compensation incentives from the board, complete with performance measures and long-term goals.

3. Appoint a director to act as a spokesperson with a clear but limited mandate to speak proactively for the board on matters relating to corporate governance.

4. Convene periodic face-to-face meetings with institutional investors and major shareholders any time the board wants to (1) lis-

ten and respond to shareholder concerns, or (2) reach out and explain its policies and decisions. The agenda for such meetings should be limited to governance matters and long-term strategy and should not compete with management's communication responsibilities. (The Pfizer board's meeting with top institutions in October 2007 is a leading example.)

5. Upgrade and promote the annual meeting as an occasion for information gathering, outreach, and controlled interaction between the board and shareholders. There is no better opportunity for directors to inform themselves about the electorate. Board members should attend the annual meeting and be available for questions.

Until boards have greater freedom to speak on their own behalf, relations with shareholders will continue to be adversarial. Both shareholders and companies would prefer to resolve their differences through dialogue and private ordering rather than confrontation and rule making, but this goal will be within reach only when the obstacles to director/shareholder communication have been overcome.

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When the enemy is us

Too many chiefs, too little crisis planning.

BY JEFFREY SONNENFELD

ON FEBRUARY 14, 2007, the brilliantly entrepreneurial chairman of Starbucks, Howard Schultz, emailed widely the following message to his surprised CEO: “Over the past ten years, in order to achieve the growth, development, and scale necessary to go from less than 1,000 stores to 13,000 stores and beyond, we have had to make a series of decisions that, in retrospect, have led to the watering down of the Starbucks experience, and, what some might call the commoditization of our brand.” However accurate his insights may have been, the media and the general public were instantly as confused as was CEO Jim Donald over who spoke for the company.

Similar board-level inconsistent finger-pointing has been witnessed over the last decade when crises broke out at such far-ranging firms as Ahold, Apple, AIG, AT&T, BP, Coca-



Cola, Siemens, General Motors, Hewlett-Packard, Royal Dutch Shell, Motorola, Radio Shack, Toyota, and many others. These weren't situations of unscrupulous leaders plundering shareholder wealth, as we saw in Enron, WorldCom, Tyco, and HealthSouth, where we might have understood any board-level confusion. The communications breakdowns in the above enterprises happened in dealing with normal business matters: succession concerns, adverse markets, faltering performance, operations failures, executive health crises, unethical subordinates, credential misrepresentations, breaches in confidentiality, product safety violations — the range of normal disappointments over human imperfections

No posturing for public consumption

The board 'speaks' through its oversight and through its advice to top management. By Robert D. Ferris

Sarbanes-Oxley has succeeded in stimulating much more active involvement of boards of directors not only in their oversight capacity but also in lending much needed skill sets, experience, and perspective to managements for addressing the very challenging business and economic issues of the day.

That said, the question of “Who speaks for the board?” is to some extent mooted in that some, including this writer, strongly believe that the board “speaks” through its oversight and through its advice to top management. As a unit, then, the board should not have a public position or point of view on normal business matters that is postured for public consumption.

Consider what would happen if boards routinely conducted their own external communications independent of the company's management. Inevitably, there

would be disconnects with the company's messages, leading to shareholder and customer/part-



ner confusion and, ultimately, to lower valuations because of inconsistent, hence weakened, branding. The theory (and best practice) continues to be that the best and most appropriate spokesperson for the company is the company itself, in the person of the chief executive officer.

The board traditionally speaks through its chairman when he or she presides over the annual shareholders' meeting or when unusual events or crises arise, such as a takeover attempt or a proxy battle for control. It is true that certain members of the board — e.g., chairs of the audit or compensation committee — have become more visible in the public arena with institutional investors, who are increasingly concerned about issues such as risk management, accountability, and managers' “skin in the game.” And we are well aware that SOX has provided whistle-

blower access to the board, as well as authority for the board to engage its own advisers, independent of the company's advisers, particularly in the areas of the law and finance. So, the notion of the board engaging their own PR/IR counsel is by no means out of the question, particularly in crises such as those mentioned above.

We maintain, however, that there is only one voice for the company, and it must be consistent with the CEO as the messenger.

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and organizational systems.

A large part of the challenge is: 1) too many chiefs, and 2) too little crisis planning.

Top leadership, and the board of directors itself, has become somewhat hydra-headed, with a plethora of exalted-sounding imperial titles, such as chairman of the board, executive chairman, chairman emeritus, senior executive chairman emeritus (as really once was the case at Dunkin' Donuts!), lead director, senior director, chairman of the executive committee, president and, of course, chief executive. When disruption strikes, long-smoldering ambiguities can lead to dysfunctional internal confusion and external losses in credibility.

Boards must act in the following ways to clarify who speaks for the corporation:

- *Halt the Proliferation of Imperial Titles.* The many “chiefs,” “senior,” “lead,” and “chairman” variations often are a political concession leading to vague overlapping roles and distracting conflicts that add to the distress in times of genuine crises. There should be an internal voice to convene meetings but the sole external voice should be the CEO, unless that officer’s integrity or fitness to serve is in question.

- *Drop the ‘Balance of Power’ Language on the Board.* That political theory term is inappropriate to the corporate boardroom and often casts an adversarial tone or shadow of suspicion between an earnest board and honest, competent management. Sure, the board is the ultimate authority, but unless directors have lost faith in the CEO, they have delegated their voice to the CEO.

- *Develop and Practice Its Own Crisis Management Plans.* This involves realistic scenario planning specific to that company and its board, not recipes borrowed from textbooks, legal manuals, or even from other enterprises. Otherwise, when caught by surprise, sophisticated boards can find their normal processes break down. At one H-P board meeting, in the fog of battle responding to the leaking of sensitive information, directors actually yielded the leadership of the meeting to their outside counsel — someone not elected by any shareholders and someone who too had been investigated as a potential source of the leak, along with the full board as later came out in the public record. Crisis planning exercises can help free boards and management teams from parochial complacent thinking and the arrogant self-righteousness termed

FROM THE ARCHIVES

The ‘very public’ public director

There is a new skill that boards must cultivate — the ability to communicate.

By Howard J. Rubenstein

Boards can no longer operate as though no one but management should be interested in their activities. In this new era, it is entirely appropriate that they search for their own ways to promote understanding of their activities, respond to criticism, and project their positive contributions and important role in guiding America’s corporations.

Of course, boards have always turned to outside public relations counsel in crises and special situations. Proxy fights, boardroom coups, top-management changes, Chapter 11 bankruptcies, and M&A transactions frequently require boards to engage and interact with outside communications advisers.

But in today’s environment, effective public outreach is quickly becoming an ongoing need, one that should be top of mind in virtually every aspect of the governance and oversight process. In many ways, a gauntlet has been thrown down. Each in their own way, regulators, shareholders and the press have signaled to boards and directors

that they expect more of them. Those of us who work regularly with boards know that additional responsibility is not something they will shy away from. The vast majority of directors are conscientious, competent, and qualified, and the boards they serve on are engaged, demanding, and committed to representing the best interests of shareholders.

The new skill that boards must cultivate in a more transparent and open environment is the ability to communicate how their good intentions, motivations, and actions work

to enhance the strength and value of the company as a whole.

From “The ‘Very Public’ Public Company Director” by Howard J. Rubenstein, Directors & Boards, First Quarter 2005. Rubenstein is the founder and president of Rubenstein Associates Inc., an independent public relations firm (www.rubenstein.com). He can be contacted at hrubenstein@rubenstein.com



by Yale’s Irving Janis decades ago as “groupthink.” Such exercises include developing known succession plans (building in emergency taking-charge provisions that have been privately discussed) and developing skills at risk management that go beyond *pro forma* committee charters.

In short, conflicting leadership messages, enabled by dysfunctional board dynamics, often exacerbate normal business challenges. This is all eminently preventable. The 1950s cartoon Pogo had its lead character, a possum, advise his pals in times of crisis — “We have met the enemy and it is . . . us!”

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No more hiding behind management's voice

The question now is not whether ... but who from the board speaks, and under what circumstances.

BY FRANCIS H. BYRD

SINCE THE ONSET of the Great Recession, the critical question of who speaks for the board, or to what extent the board should speak, has become one of vital importance. The expectations facing directors from regulators, investors, and the business media may be misplaced, but they now represent a fact of life. The question now is not whether the board should speak, but who from the board should speak besides the CEO, and under what circumstances. Ordinary circumstances such as earning releases, new product introductions, analyst conferences, and engagements with shareholders usually do not require the presence of a board member.

Our experience at The Altman Group leads us to say that the party who should speak for the board depends on the answers to the following three questions:

- *What Is the Nature of the Issue/Situation?* Is the company in a weakened industry and has accepted a massive taxpayer financed bailout, or is it a question of convincing shareholders and proxy advisory firms that the firm's compensation program drives performance and does not incentivize risky business practices?

- *How Does the Issue/Situation Need To Be Addressed?* Would

the board member need to appear before Congress and/or regulatory agencies to testify, or would participation in a conference with RiskMetrics or BlackRock be an appropriate course of action?

- *Who Is the Audience(s) That Will Be/Is Being Addressed?* Do the public markets, consumers, and regulators need reassurance about the company's viability, or are a group of vocal institutional investors perhaps asking for a review and report on the company's environmental or human rights policies?

Where public and investor confidence in management has been seriously shaken — for example, as in the present crisis at companies participating in a government bailout program — the role of a director speaking for the board can help demonstrate the board's commitment to, and its involvement in, guiding the company through the rough patch. This represents a “big stage” example of board involvement that most companies are unlikely to ever experience.

More likely, a company may have a problem with proxy advisory firms, or activist shareholders or institutional inves-



The general rule is best — one voice only By Betsy Atkins

Following the embarrassing boardroom leaks at Hewlett-Packard, many boards have adopted a confidentiality policy explicitly stating that board members not speak to the press.

Boards should specifically discuss and agree on a policy that board members either are, or are not, to speak with the press. If a board decides as a group that they will have direct contact with the press, it should be one voice, either that of the lead director or the nonexecutive chairman. When it is determined that it is appropriate for the board to communicate, speaking through



the lead director or nonexecutive chairman will make it clear that

it is the voice of the board that is speaking, not management.

There are exceptional circumstances — a major upheaval such as a CEO succession issue — when it is appropriate/necessary for the board to respond. We faced this at HealthSouth Corp. when we had to remove the founder, CEO, and chairman, Richard Scrushy. We then had our nonexecutive chairman speak with the press after coordinating with our crisis management PR firm.

In the circumstance of activist shareholders and unsolicited takeovers, it may be appropriate

for the board to respond to the press via its lead director or non-executive chairman.

As a general rule, there should only be one voice speaking to the public, and that remains management's.

Betsy Atkins is an entrepreneur who has co-founded several high-tech and consumer companies and served as CEO and board member. She also has been an active independent director for the past 20 years, and is currently serving on five public company boards. She can be contacted at betsy@bajacorp.com.

tors advocating through the shareholder resolution process or short-slate candidacies, for the company to take a specific course of action to increase shareholder value. In these instances the involvement of a lead director (and/or committee chairs, if appropriate) can be extremely helpful in resolving investor concerns — or when necessary, defending the company's strategy or executive compensation program — and removing from the discussion the appearance of management self-interest.

The bottom line is that the role of the public company board has changed forever. Directors can no longer remain hidden behind management and the CEO as the company's

key or sole spokesperson(s). There will be occasions in the life of a company when board members will need to step up to the microphone, at either a press conference or a teleconference. Directors, executive management, and their advisers should be prepared for this eventuality.

Francis H. Byrd, managing director at The Altman Group, provides strategic advice on governance issues to boards of directors and senior executive management of corporate issuers. He also edits the biweekly e-newsletter *Governance & Proxy Review*, which is distributed to 17,000 professionals around the globe. He can be contacted at fbyrd@altmangroup.com.

Any 'breaking of silence' must pass two basic tests

BY MYLES MARTEL

THE TIME-HONORED PRINCIPLE that an organization should speak with one voice — the CEO's — continues to have significant, but not absolute, merit. One voice, versus two or more, has historically helped preserve corporate credibility and continues to do so while preventing confusion caused by discordant messages as well as preempting potentially troubling questions, such as "Who's really in charge?" and "Has the board lost confidence in senior management?" Moreover, a single voice has helped shield the board from undue exposure and best kept it out of the court of public opinion.

Possible exceptions do apply and could well increase as media scrutiny intensifies, with business TV programs, Internet sites and other forms of coverage proliferating and competition among them for sources and scoops escalates.

These exceptions mainly include:

- Announcements regarding board composition, e.g., a new retired, removed or deceased board member.
- Matters regarding the hiring of a new CEO, including information pertaining to the selection process as well as a statement endorsing the candidate selected.
- Statements related to matters mainly within the purview of the board, e.g., compensation and governance policies, and major transactions, including hostile takeover and merger activity.
- High-profile charges of improper conduct by senior management where the board's message would normally be more focused on process than the merits of the case.

Any exception must carefully pass two basic tests: (1) Is the board's message necessary — is it likely to influence key

stakeholders? and (2) Do the rewards outweigh the risks?

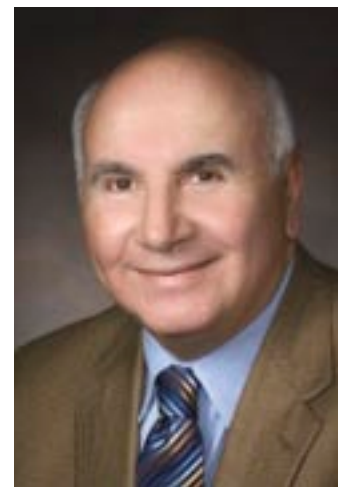
For example, if a CEO's reputation as a leader is facing fierce public criticism, especially from major stakeholders, would a "full faith and confidence" statement

issued by the board enhance the CEO's standing, or would it generate a skeptical "that means that the CEO will be gone soon" reaction? After all, firings have often occurred following such statements. Further, such a statement could create the perception that the board is limiting unduly its options to

replace the CEO in a sufficiently timely manner. In such situations, therefore, the board's attempt to support the embattled CEO could backfire and undermine their own, the CEO's, and the organization's credibility.

Only in the rarest of circumstances should a board member grant a media interview or be available to financial analysts, for his or her response to a question could unwittingly undermine both the board's and management's credibility.

When a board decides to issue a statement, it, too, should have only one voice, the chair's or the lead independent director's (if the chair is also the CEO), unless a more generic "the board stated" suffices. Possible exceptions, which must also be weighed carefully, involve a board member whose role and expertise might better serve the board's goals, e.g., the chair of the compensation committee. Regardless of the source, all board communications made public should be



reviewed in advance with the CEO.

Despite stakeholder and media pressures, as boards remain judiciously open to possible exceptions in making their voice public, they should continue to favor the clear advantage of silence over the inherent risks of unnecessary disclosures.

Myles Martel is president of Martel & Associates, a firm specializing in leadership development and personal image enhancement through high-impact communications such as speeches and presentations, media appearances, road shows, crisis preparation and response, and government testimony (www.martelandassociates.com). He is the author of five books, including *Fire Away! Fielding Tough Questions with Finesse*. He can be contacted at mmartel@aol.com.

There are benefits to all in increasing the director's voice

Enhancing the role of directors might actually improve the public perception of corporate executives, now at low ebb.

BY PETER CLAPMAN

WHO SPEAKS for the independent directors of public companies or the role of boards in our corporate governance system? We know who speaks for management, since their organizations are well funded and well staffed and very visible on regulatory developments affecting their interests. We know who speaks for shareholders, or at least those shareholders that are active in governance with high exposure in the press.

One organization that does speak for directors is the National Association of Corporate Directors (NACD), which prides itself on being the "Voice of the Director." (Note: In the interest of disclosure I am on the board of directors of the NACD.) Apart from the NACD, there is no established forum for the views of independent directors to be credibly heard.

This disparity in press coverage and lobbying clout is clearly not good for our system of corporate governance. The "Key Accepted Principles" to strengthen corporate



FROM THE ARCHIVES

A missing director

Why aren't more PR experts on boards?

By Gerald J. Voros

In corporate conflicts, do boards of directors have access to PR counsel from a fellow board member? Probably not, since a recent search that we undertook to answer this question turned up only about 12 executives with a public relations or community



affairs function who are serving as members of corporate boards. There may be more, but chances are that the PR professional who makes it to a company's board of directors is a rare bird.

Do PR professionals warrant a seat on the board? I think they do.

Without knowing the impact of board action on various publics, the board may not make the wisest decisions. Board members are not trained

communicators. They are decision makers acting in what they believe to be the best interests of the corporation, but not always with an adequate understanding of how corporate interests may clash with the perceived interests of publics such as employees, shareholders, the general public, community action groups, etc. In this era of instant public reaction, an ability to communicate well on an informed basis can make the difference between winning and losing, in business as well as in politics.

From "A Missing Director: The Bearer of Bad News," by Gerald Voros, Directors & Boards, Fall 1982. He was then the president and COO of Ketchum Communications Inc.

governance published by the NACD are being applied by many boards. Yet, little press coverage has been given to this independent director initiative. Consequently, most of the public has little understanding about what independent directors actually do or their role in the corporate governance system.

Both management and shareholder organizations should recognize that they are poorly served if the current understandings of the boardroom and governance priorities are not altered. For management, enhancing the role of directors might actually improve the public perception of corporate executives, now at low ebb. Shareholders need to increase the accountability and performance of all boards. Relying mainly on such strategies as ousting directors or nominating alternate directors can affect only a few corporate outliers at best. Often, it is hard to know which company directors are deficient until it is too late. Why not place more emphasis on insisting that all board members obtain continuing boardroom education, as is widely available?

So, what is the answer? I start with the premise that, without support from management and shareholders, it will be extremely difficult for boards to be heard in a way that is best for our system of corporate governance. Over the past few years, much has happened to improve board performance, beyond what the public perceives. Management and shareholders should recognize that it is in their own best interest to support that continuing process and make it more visible. To accomplish this result, they, too, have a stake in increasing the voice and effectiveness of independent directors.

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The best way to lead: One voice and a consistent message

Unanimity and shared commitment to strategic goals are crucial to superior performance.

BY LISSA PERLMAN

BEFORE ASKING “Who speaks for the board?” it is important to consider whether the board should speak at all — a question with serious implications for the stability and continuity essential to corporate performance.

In practice, there are moments in the life of a corporation when the board must speak — typically, moments of crisis or major transition. Generally, however, a board that speaks independent of management creates significant risks.

The board must be able to balance multiple concerns as it pursues its primary and vital functions in helping to set strategy, oversee management, and guide future direction. Communicating directly and routinely with multiple stakeholders may undermine its ability to achieve this balance and may create dangerous distance between the board and management. This is precisely why communication has historically been the purview of management.

Communication should be part of a board's operation, but primarily as a means of facilitating a healthy working relationship between directors and management. In this context, who speaks for the board takes on a different meaning: who speaks for the board as its representative — and the shareholders' representative — to management? Who engages directly

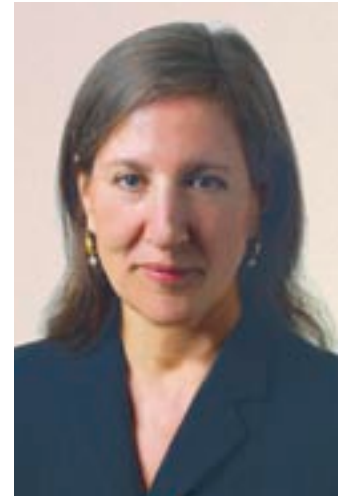
with the CEO to assure that the board is receiving adequate information from management? Who helps to prevent insularity and isolation, keeping the board sufficiently aware of the company's operating environment?

Often, this important function is served by the nonexecutive chairman or lead independent director. While not appropriate for every company, this position is becoming increasingly prevalent, increasingly important, and increasingly difficult, helping to assure common purpose and to balance interests that may not be completely aligned. And in those situations when the board must speak, this individual can be a powerful voice in the governance equation.

Directors should also have a feedback mechanism — the ability to hear from the company's stakeholders. Unfettered, anonymous research work can often help provide this valuable input. Management should feel secure sharing such research with the board and should be prepared to address any concerns it may raise.

When the company or management team is already challenged, the board must be guided in its decision about whether or not to communicate by what will maximize its ability to stabilize the company. Optimally, the board will already have considerable knowledge about the company's relationships with key stakeholders that will factor into its decision. Awareness of dissatisfaction or conflict may prompt proactive outreach to significant shareholders, or others, to listen — a prudent step toward preempting hostile action. A regulator, legislator, or shareholder may request an audience with the board; granting such a request must be considered carefully to avoid creating crisis where none may exist.

Generally, however, it is vital that the senior leadership of a publicly traded company present one face to all stakeholders — and, generally, that face should be the CEO's. Unanimity and shared commitment to strategic goals are crucial to superior performance, especially in a time when it is easier than ever for agenda-driven institutions and other stakeholders to exploit even the hint of a wedge between management and the board. Speaking with one voice and with a consistent message is the best way to lead a company through the treacherous shoals of today's business environment.



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Let's focus on the board hearing from the owners

At critical points, one-on-one unfiltered communication between owners and board members is absolutely essential.

BY MARIO CIBELLI

WHO SPEAKS for the board? How about: *Whom does the board speak to?*

It is the reverse dialogue that is most interesting to me and other investment managers who are long-term oriented and focused on company fundamentals. Our investment fund has been in existence since 1997 and has, from time to time, sought to communicate with board members of our portfolio companies. When owners communicate with board members, an unfiltered flow of ideas and expectations is initiated. I believe this provides a benefit to all the relevant parties in the corporate structure.

Shareholder communication with board members is often discouraged for a variety of reasons that I will not address



here. I believe that this line of communication is necessary and an essential part of maintaining a culture of strong corporate governance.

The corporate structure can be broken down very simply as follows: owners, management, and board members. Board members are responsible for setting high-level policy and goals for management to execute so that the owners may ultimately benefit. Owner expectations and feedback are appropriately shared with

management. Management in turn is expected to share owners' thoughts and concerns with board members. While this process generally works for all concerned parties, it is the unfiltered flow of information that is necessary to insure board members are receiving an accurate set of expectations from owners.

Before board members start squirming in their seats at this notion, let me make clear that the traditional lines of communication cover most of the concerns any owner might have. Direct communication between a grandmother looking for her extra shares after a split and board members is not a good idea. Likewise, I believe short-term-oriented

FROM THE ARCHIVES

It's 'show me' time

Boards need to better demonstrate their leadership to the public.

By Leon Panetta

While we haven't quite gotten to the point of real-time public scrutiny of board decisions, the desire for more information about board deliberations is building.

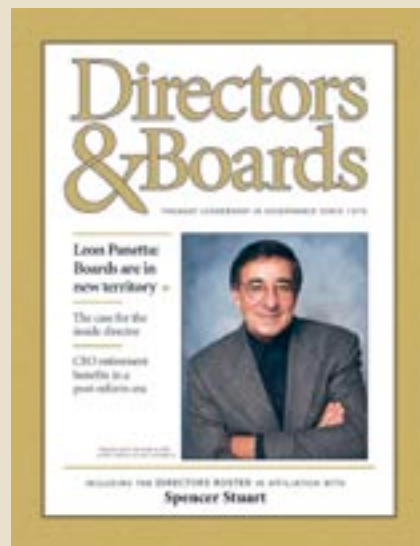
Exercising oversight in the sanctity of the boardroom and proving that you have done it are two different things. In order to restore trust, boards have to prove it. This is new territory for boards. It isn't clear how far we will have to go — not to do our jobs well, but to make it apparent that we have done so. Will the board have to communicate separately from the CEO? That's one of the consequences now, with a majority of the board being independent directors, and the requirement that those independent directors have the opportunity to meet separately from management. Does the board have to have its own communications function, its

own advisers? Many will.

Can we, and should we, better demonstrate our leadership? Can we end the long tradition of the boardroom as a sealed chamber from which we issue only unanimous endorsements of management's actions and results? Can we move toward more transparency about the boardroom process, without undermining the ability of management teams to produce the results that shareholders want?

We can, if we as individual board members continue to do what we have done well in the past, but do more of it, and if we communicate our actions in a timely and effective way.

From "It's Not Just What You Do, It's the Way You Do It," by Leon Panetta, Directors & Boards, First Quarter 2003. At the time,



he was serving as a corporate director and member of the board of the New York Stock Exchange, where he co-chaired a committee that proposed changes in governance practices. He is now director of the Central Intelligence Agency.

owners should have limited opportunities to influence board members. Of course, any shareholder can always communicate with board members by simply writing a letter to the board. But at critical points most often associated with corporate events, that one-on-one unfiltered communication between owners and board members is absolutely essential.

I would emphasize that, in my experience, the smaller the company, the more likely the need and the more beneficial it is to communicate with board members. Oftentimes such communication is appropriately one-sided in nature, meaning the board members are exposed to the thoughts and suggestions of owners but not the reverse. As I suggested above, very often there is a catalyst that prompts this line of communication. Of course, it is natural that the larger the stake in the company, the more likely that this line of communication will be open to owners. In my experience, though, I have often found that an investor with a long-term focus and high level of knowledge and understanding around the business is as worthy of attention by the board as one with a large ownership interest.

There will always be barriers erected by some to prevent this important line of communication from occurring. The reasons for board members not communicating with shareholders are many, but at the end of the day who really wants to prevent owners from sharing thoughts and expectations with the individuals entrusted to act in their best interests? What engaged board member wouldn't want to hear what an owner has to say?

Mario Cibelli is the managing member of Marathon Partners, an investment partnership focused on equity securities. The fund deploys capital with a long-term investment horizon, seeks deep knowledge of its portfolio companies, and prefers concentrated investment positions. When appropriate the fund has taken a more active role with its portfolio companies, offering insights and advice to company management and board members. He can be contacted at mario@marathonpartners.com.

Listen to the investor's voice

Yes, there is a case for the board to speak, and also to listen.

By Debra Perry

I believe that there are times when the board needs a voice. They include the resignation, retirement, or incapacity of the CEO, at the conclusion of a proxy fight, or at the end of a special board investigation or regulatory settlement. Every situation is different and the board needs to make a case-by-case



decision as to whether a public statement is appropriate.

When a public statement from the board is desirable, then who does speak for the board? The board will be better prepared for these moments if it discusses communication tactics in advance, including who should act as its spokesperson. In my view, the nonexecutive chairman or lead director is the natural candidate to speak for the board. That individual should not speak, however, unless the board agrees that a public statement is desirable, concurs on the substance of the message, and is comfortable that its spokesperson has the communication skills to convey the right tone and message. Under some circumstances, prior legal review of the message might be prudent. In all circumstances, senior management should be informed in advance.

Apart from broad public communication to all stakeholders, are there other occasions when the board should speak?

For example, how should boards respond to major institutional shareholders who request a meeting with one or more representatives of the board?

In my experience, most directors are strongly opposed to communicating directly with individual shareholders, largely out of concern about inadvertent violation of the laws governing fair disclosure. Despite this concern, one of my boards offered to meet a few months ago with a large, long-standing institutional shareholder that was upset with the performance of the stock and with the board. Our going-in condition was that at least two, if not three, directors would be present at the meeting. We designated our nonexecutive chairman, the chair of the governance committee, and the chair of the compensation committee to meet with this investor.

The outcome was surprising. First and foremost, they wanted us to listen. They wanted to voice their concerns directly, without the filter of the company's IR team. They argued that the board lacked some critical expertise, yet some of their facts were wrong. This was an opportunity to acknowledge their concerns, share our point of view about the governance issues and, importantly, demonstrate that we cared about the views of our shareholders. At the end of the meeting, we agreed to disagree on a number of issues, but our shareholder expressed satisfaction that we had been responsive. My takeaway from this meeting was that boards not only need to speak from time to time, they need to engage in active listening.

Debra Perry serves as a board member of Conesco Inc. and Korn-Ferry International. Her career has been in fixed income research and capital markets, including 12 years with Moody's Investors Service, where she was senior managing director of global ratings and research from 2001-2004. She can be contacted at perry.debra@gmail.com.

Distinguish between ‘war time’ and ‘peace time’

In contentious situations, most public communications by boards are best accomplished through press releases or prepared statements.

BY JOELE FRANK

TYPICALLY MANAGEMENT IS TASKED with communicating on behalf of the company and, by extension, the board, but there are instances when the board should have its own voice. In corporate communications, the rules of engagement for boards differ in “peace time” and “war time.”

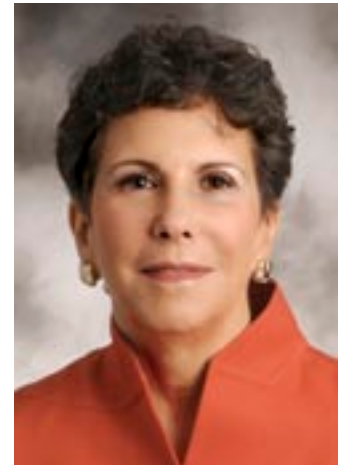
“Peace time” is otherwise known as “business as usual,” which is to say, the company is not the target of an unsolicited acquirer or activist shareholder, is not engaged in a proxy contest, or other “war time” activities.

In “peace time,” the decision-making process related to governance and strategy takes place out of the public view and the board communicates to external audiences through the words and actions of the senior management team, often via press releases, industry conferences and analyst teleconferences. For the most part, the board delegates to management, and management uses its own words and communications vehicles.

In “war time,” however, the board itself comes under scrutiny, and in some instances becomes the direct target of attacks. As a result, the board’s interest in — and control over

— communications reflecting its and the company’s position increases considerably. To preserve and, in some instances, enhance its credibility, a well-advised board will actively participate in the company’s public positioning through a number of means, including board-authored letters or statements. In these situations, it is the board’s responsibility to ensure that its position is accurately reflected in the public domain.

Boards often establish a special committee of independent directors when there is a conflict of interest, or even a potential or perceived conflict. This could occur in an M&A situation, an audit committee issue, or litigation, among other scenarios. Given that the interests of management could potentially diverge from those of shareholders, the special committee will want to exercise tight control over the timing and content of all public communications by either collaborating closely with the company’s communications team or, in certain circumstances, retaining its own advisers.



Communicating by proxy is no longer enough

By Karen Kane

Boards should never be caught not knowing what their shareholders think. Indeed, the SEC has pledged to take a hard line on companies’ compensation and governance disclosures this year, demonstrating its support for shareholder access to the information they want.

In this period of intense governance scrutiny, boards must assert their independence and authority by communicating directly with their shareholders. It no longer is enough for boards to communicate only through the legally required proxy, 10-K, and 8-K documents. They must do more to show they are



representing owners and holding management accountable.

Engaging directly with shareholders is not work that comes naturally to boards. The boards that turn to lawyers for help or believe that Regulation FD both prevents and protects them from shareholder engagement will be sadly mistaken.

Just as a board hires its own compensation consultant, the board needs to engage the services of a communication consultant as it works through its specific shareholder communication needs and shareholder engagement opportunities.

Turning to management resources within the company in investor relations or corporate

communications is no longer appropriate: The board needs to preserve its independence by deciding how it will engage with shareholders and the public that has largely lost faith in the board’s ability to provide oversight. Decisions about board-shareholder communication must emanate from the board.

The tide has turned in favor of empowered shareholders who want and expect unfettered access to the board they elect. Boards that utilize communication opportunities will begin to develop a loyalty that can contribute to longer-term investing.

Karen Kane is managing partner of Karen Kane Consulting (www.karenkaneconsulting.com), a Chicago-based firm that consults with management and boards on effectively engaging with shareholders. She can be contacted at karen@karenkaneconsulting.com.

In general, members of the board or special committee do not speak directly to the press in contentious situations. Rather, most public communications by boards are best accomplished through press releases or prepared statements.

In summary, for special situations like those described above, the board typically “speaks” on its own behalf and presents itself — both practically and from a perception standpoint — as independent from management. Boards in “war time” situations should work closely with outside counsel (financial, legal, and

public/investor relations) to ensure that all of the company’s stakeholders understand the decisions made and the steps the board has taken to preserve and enhance shareholder value.

Joele Frank is managing partner of Joele Frank, Wilkinson Brimmer Katcher (www.joelefrank.com), which she founded in 2000. The firm has particular expertise in corporate communications, investor relations, transaction communications, and crisis communications. She can be contacted at jfrank@joelefrank.com.

Keep the board’s voice orderly and ‘on message’

Loose-cannon directors interfere with the disciplined persona the board should project and can fuel concerns that the board itself is not united. **BY ROBERT DILENSCHNEIDER AND BARBARA ETTORRE**

VIRTUALLY EVERY DAY, a public-company board in the United States is positioned to make a major policy statement on one issue or another.

The pressures are huge. Advice from lawyers, accountants and advisers is legion. And, at this writing, there is no “one-size-fits-all” rule board to give a clear direction — it depends on circumstances. And, don’t think you’re off the hook if you’re not the outside chair or lead director. Certain expertise may require that the most appropriate board member respond.

We have advised many boards, and we recommend that the board:

1. Define the various circumstances and level of gravity that may warrant a board response.
2. Develop an orderly procedure to identify the issue, define the message, and select the most appropriate spokesperson.
3. Train all directors in basic interview and message delivery techniques.
4. Identify, in advance, the most appropriate communications channel for the board’s message. (An interview with a single, fair-minded reporter may be far more effective than a press conference in delivering a consistent message.)
5. Assess reaction to the board’s response and plan follow up, if warranted.

A suggestion is frequently made that lawyers and outside advisers speak on matters of importance. We recommend against this. An outside director or an internal spokesperson will carry much more impact.

Depending on the seriousness of the event, many boards involve professional communications experts independent of management and the corporate communications or investor relations function already in place. In these instances, the board should inform management that it will be working

with an experienced outside communications expert to develop a strategic plan and messages and work with the board’s designated spokesperson, including media training.

The adviser should confer with management so there are no surprises, as long as appropriate confidentiality of board deliberations is observed. The adviser reports exclusively to the board and should only communicate management’s point of view in the interest of informing the board’s decision.

The intent is not to second-guess management or its decisions but to allow the board to exercise due diligence more fully in time of crisis.

The designated spokesperson should be a director with gravitas, who is comfortable with the media and knows how to stay on message. It should be understood that all comment goes through this individual — loose-cannon directors interfere with the orderly, disciplined persona the board should project and can fuel concerns that the board itself is not united.

Several points to keep in mind:

- Public relations counsel can counterbalance advice from legal advisers.
- Any board response must be put in terms of the shareholders.
- The response must be unanimous.
- In contentious situations, a public relations expert should advise the board, not lead it.



Robert L. Dilenschneider (pictured) is president of The Dilenschneider Group Inc. (www.dilenschneider.com), a New York-based strategic communications firm. **Barbara Ettore** is a principal at The Dilenschneider Group in charge of the firm’s board and governance practice. They can be contacted at rld@dgi-nyc.com and betorre@dgi-nyc.com.