

Opinion

Skipping the pointless ‘company versus activist’ battle

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BARRY ROSENSTEIN

It is the call that can ruin a chief executive's day: “Hello. We are now one of your largest investors, and we would like to discuss our ideas about generating greater value for shareholders.”

In all the years that I have been making this call as a shareholder activist, the reactions on the other end of the phone have ranged from stony silence to the indignant ticking off of past accomplishments, but “thrilled” has never been one of them.

Once the call is over, the chief executive and board must choose one of two paths. They can either review our proposals dispassionately and, if they make sense, act on them, or they can fight using the traditional corporate defence playbook, which includes legal devices such as “poison pills” and labels such as “raider” and “short-termer.”

In 2006, I argued for the first approach in the opinion page of this paper. I wrote that “management would be better off engaging activists to determine whether their ideas might be the best medicine for stagnant stock prices”, rather than fighting off activists using the usual legal and rhetorical defences.

While it seemed somewhat like wishful thinking at the time, today an increasing number of companies are adopting this more constructive approach. According to FactSet Research, in 2006 34 per cent of S&P 500 companies still had poison pills and 41 per cent had staggered boards, compared with 7 per cent and 11 per cent in 2013, respectively.

Activist encounters today are also more likely than ever before to end quietly with the implementation of the

activist's ideas. In fact, we actively engaged with five US public companies in 2013, all of whom have adopted some or all of our proposals without much, if any, of a fight.

While I would like to think we have become more persuasive over the years, or that companies have simply given up the fight, the truth is more interesting: they are fighting smarter.

There used to be little downside for companies in fighting off activists using the old defences, even if they were ultimately unsuccessful. For many shareholders the jury was still out on the benefits of activism, meaning they were less likely to hold efforts to preserve even an underperforming status quo against the sitting board and chief executive. Today, however, after years of seeing activists in practice, shareholders have almost uniformly embraced the benefits of activism, both in starting a discussion intended to ferret out the best ideas and in serving as a check on boards and management. In fact, just this month, Mary Jo White, the chairman of the SEC, the US regulator, noted the “widespread acceptance” of many of the policies advocated by activists.

In the current environment, any board or chief executive that rolls the dice on trying to defeat an activist by relying on tactics and rhetoric runs a

far greater risk than ultimately being forced to implement the activist's proposals; they risk alienating their shareholders and tarnishing their reputations by pointlessly fighting change. On the other hand, no board or chief executive is going to be penalised by shareholders for acting on a good idea just because it came from someplace else.

In fact, companies can stop activists in their tracks by adopting their proposals. More and more companies are realising that if you are going to act on someone else's idea, there is not much point in waiting. At the same time, if a company truly believes an activist's proposals will not create greater value, it enhances its argument by relying on facts rather than strategic ploys.

This trend does not mean that such companies are “losing” to the activists. It means that they are skipping the pointless “company versus activist” battle and moving straight to the larger battle of ideas, where “winning” means everyone benefits. Those shared victories are a truer sign of progress for shareholder activism than any number of traditional battle wins, because they signal the broader institutionalisation of activism.

Much like the case with private equity decades ago, the fights should steadily fade into the background and the debate about value should increasingly take centre stage. In fact, perhaps in another eight years it will be entirely unremarkable that companies are routinely acting upon activist proposals, and public disputes will be even fewer and further between. This time around, that seems much less like wishful thinking.

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