

Challenging the Imperial Boardroom

Dell is just one recent example of a dysfunctional system of corporate governance.

Wall Street Journal
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September 18, 2013

I'm no political scientist, but it doesn't take a genius to understand that voting is crucial to democracy. When things aren't going well, citizens can vote the leaders out. A lot of blood has been shed for these rights, and while democracy isn't perfect, to paraphrase Winston Churchill, it's far better than any other system of government.

What baffles me is that voting rights really don't apply to public corporations. Shareholders can vote, but boards can just ignore them under the "business judgment rule" backed by state laws and courts. In the middle ages, feudal lords asserted the "divine right" of royalty to justify their lordly positions while plundering the peasants. Today's boards act like they are vested with similar powers: the divine right of boards!

How did this board-centric system ever come about? Years of lobbying by pro-management groups in state legislatures produced a thicket of laws that protect the impregnability of boards and CEOs. Shareholders have been relegated to a "take it or leave it" status.

How can it be, for instance, when a shareholder purchases 10% or 15% of a company's stock, management can legally issue a flood of new stock to dilute those holdings and thwart a takeover because it may cost them their jobs? How is it fair that boards can simply ignore shareholder votes and leave incompetent crony directors and CEOs in place? Or legally ignore shareholder board nominations despite overwhelming evidence that new ideas and strategies are essential to salvage a failing business?

Is it fair that CEOs make 700 times what the average worker makes, even if the chief executive is doing a terrible job and thousands of workers are laid off? Why do CEOs get awarded huge bonuses by friendly boards when the share prices are down by double digits and then get their options reset to lower levels as an "incentive"?

[Dell](#) is just one recent example of a ridiculously dysfunctional system. Lacking strategic foresight, the Dell board for years presided over the loss of tens of billions of dollars in market value at the hands of CEO [Michael Dell](#). Instead of deposing him, the Dell board froze out shareholders and last week voted to allow the CEO to buy the company at a bargain price using shareholders' own cash.

This transaction deprives long-suffering shareholders from benefiting from the green shoots of its newer businesses that Mr. Dell has just recently been touting. When shareholders earlier this year objected to the vast wealth transfer and voted it down, the Dell board simply ignored these results and changed not only the voting rules but the voting dates, thus blocking alternatives and ensuring eventual victory.

It is practically self-evident that if the system of corporate governance in American business was improved, shareholders would greatly benefit. At the risk of being immodest, I believe our record at [Icahn Enterprises](#) LP proves this almost to a certainty. Over the years, we have attained great success by religiously following the activist model.

If you invested in Icahn Enterprises (IEP) for the period Jan. 1, 2000, to Sept. 10, 2013, you would have a total return of 1,116% today, compared with the S&P 500 total return of only 49%. In addition, the total return for IEP's hedge fund from Nov. 1, 2004, to Sept. 10, 2013, was 254%, for an annualized return of 16%. During that period, the S&P gained 80% for an annualized return of 7%. Year-to-date, our hedge fund is up by 30% as of Sept. 10.

Our record was attained not by investing in the "right" companies and hoping the stock would rise, but by investing in underperformers and forcing them to change, often by installing better managers. We never tell these managers how to run the business or micromanage; instead, we provide oversight and demand accountability.

The value of activism is further reinforced by Harvard Prof. Lucian Bebchuk and co-authors, who recently conducted an in-depth study of some 2,000 activist campaigns from 1994-2007. The study concluded that "operating performance improves following activist interventions," and that these improvements continue for years after the intervention.

Activist strategies are fraught with challenges, which is why there are few consistently successful activists.

CEOs, who are accustomed to having their own way, invariably lash out publicly at activists through media campaigns and fight tooth and nail to defend their positions—often ending up in expensive court battles. In addition, the capital needed for these campaigns can run into hundreds of millions if not billions of dollars, and this capital can be tied up for years.

We believe without question that holding boards and CEOs accountable and replacing them when necessary will improve the economy, make companies more competitive, increase employment and add to shareholder value.

To bring this about, laws must be changed so that shareholder votes count and so that activism can be effectuated by more than just a few stalwart activists with the staying power to take on intransigent corporate managements.

With the advent of Twitter and other media, I and my colleagues intend to make more shareholders aware of their rights and what can be done to keep these rights from being trampled on. We also think that mutual and index funds should do more to exercise their power against incompetent managements and boards.

We believe the time has come for shareholders to stand up for their rights. To this end, we have set up a Twitter account that already has over 80,000 followers. We are also establishing a forum called the Shareholders Square Table to further these aims.

What I said 25 years ago at the Texaco annual meeting still stands: "A lot of people die fighting tyranny. The least I can do is vote against it."