

**CORPORATE
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SECRETS OF AMERICA'S TOP

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DIRECTORS

**AN EXCLUSIVE, MULTI-YEAR
STUDY INTO THE 'WHO'
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HOW THEY DO IT**

PLUS: SPECIAL REPORT ON AI GOVERNANCE

THE RULES OF ENGAGEMENT

At a time when investors routinely seek insights on governance, compensation and sustainability from directors, boards must walk a fine line between answering questions and oversharing.

BY RUSS BANHAM

Through the years, Bruce Clafin has learned a valuable skill as a much-in-demand board member—how to delicately respond to shareholder questions and concerns without delving into subjects best handled by management. “The principal interface with investors should be management, as they’re there day-to-day and are close to all the issues,” says Clafin, who has served on the boards of 3Com, Time Warner Telecom and Advanced Micro Devices. “But there are times when a major investor wants or needs to talk to someone on the board, particularly when it involves governance or corporate responsibility.”

In a world of instant information, some of it fake and much of it muddled, it’s understandable that shareholders get anxious about their holdings—and turn to the people entrusted to represent their interests for answers. Boards are being forced to adapt to a world where large shareholders seek intel from directors on any number of subjects—from what’s being done to comply with a new regulation to what plans are underway to confront a disruptive competitor. And that can bring on a whole suite of challenges for directors.

WATCH THE LINE

If Clafin is the director designated to talk with shareholders when such a need arises, he spends a considerable amount of time preparing for what can be a fraught

discussion. “I read what the analysts for the particular shareholder have written about the company to get in advance of the potential discussion topic,” says Clafin, who currently sits on the boards of Ciena and IDEXX Laboratories.

During such meetings, he strives to project his knowledge and understanding of both the company and the investor’s concerns. “Most importantly, I know when to say ‘I don’t know,’” says Clafin. “That’s when you can get into trouble.”

The latter is critical, lest a director run afoul of Reg FD (for Fair Disclosure), which prohibits them from disclosing material nonpublic information to shareholders and other investors unless the information is distributed to the public first or simultaneously. Implemented in 2000, the regulation was designed to stop the selective disclosure of market-moving information to some but not all investors. Since then, the Securities and Exchange Commission has brought very few Reg FD cases, most recently in 2023 against a former board member of Digital World Acquisition.

Reg FD does not prohibit investors from asking any questions they choose to ask public company executives and board members. It’s up to directors to know what they can and cannot share—and to refrain from crossing that line. That can be hard to do in an age of 24/7 financial news, instant AI-generated predictive insights and easy-to-schedule virtual meetings.

Most of the board members we spoke

with for this article believe there is a role for them to play in shareholder engagement beyond their attendance at the annual meeting, largely to dispel rumors or clarify performance against strategy. For example, while shareholders are generally aware of a company's succession management plans and acquisitions strategy, an unexpected CEO departure or news reports broadcasting the name of the acquired entity may be perceived as controversial or signs of trouble ahead. Boards can quickly intervene to put these concerns to rest.

Most board members see their role as passive, engaging only when investors reach out to them and rarely the other way around. When large shareholders look to engage with directors, they tend to be seeking information on one of a handful of topics—executive compensation, SEC disclosures, management and board diversity, cybersecurity and governance. Several directors say they assiduously avoid taking calls from investors and routinely forward the message to management, typically to investor relations. But as Claffin alluded, there are times when shareholders are insistent and the subject is appropriate for directors to intervene. "Assuming it's on a case-by-case basis, an experienced director will be dispatched by the board to engage with shareholders on a particular subject," he says. "The important thing is to know when it is appropriate or inappropriate to respond to their questions."

SOME SAY NO

Walking this fine line is not worth the effort for some boards. "We tend to shy away from shareholder meetings, in large part because all shareholders need to receive material information at the same time," says Errol Glasser, who sits on the boards at publicly traded Century Aluminum Company, a U.S.-based producer of primary aluminum, and investment company Regency Affiliates. "Meetings with shareholders that require a 'special relationship' are not worth their while. Fortunately, both companies' investor-relations guys do a great job communicating with the shareholder analysts without giving away the tidbits."

Jim Hunt, who has served on the boards of nine publicly traded companies over the past quarter-century, says he



has never been in a situation where the board felt it was appropriate to engage directly with shareholders. "It would be a management failing should directors be thrust into the role of engaging with shareholders," says Hunt, a board member at PennyMac Financial Services, a large U.S. mortgage originator.

Nevertheless, he acknowledges that boards today are much more in the spotlight. "Shareholders want to know more about the board's expertise and competence to provide effective oversight



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and governance,” says Hunt. Asked to elaborate, he cites the board of directors at Theranos for their alleged failure to ask tougher questions about the company’s miniaturized blood tests, which didn’t work as advertised and hastened its demise. “The Theranos situation is an example of prestigious but unknowledgeable governance,” Hunt says.

Aside from wanting to personally assess the expertise and competence of board directors, other situations encouraging board engagement with shareholders involve crises like a sudden offer to buy the company or the unexpected retirement of the founder, CEO or board chair, he says. Another is an activist investor. Leon “Lee” Cooperman, a billionaire investor and hedge fund manager, has been known to press directors for information. “I’ve been on two boards where Lee Cooperman was a big investor. He’s not a shrinking violet and asks a lot of questions the board shouldn’t really answer, as it would involve preferential information,” says Hunt.

ACTIVE ENGAGEMENT

Other board members share this perspective. “It’s common for shareholders to want the board to be accessible in periods of difficulty,” says Gordon T. Hall, non-executive chair of the board at public company Archrock, a leader in natural-gas compression services and equipment. “If there’s a sudden transition in leadership and the person in the succession plan is not ready to become the CEO, the market may want assurance from the board that somebody is watching the ship on an interim basis.”

Another motivation for board engagement is when a large shareholder or group of investors is confused about the company’s strategic direction or disagrees with management actions. “If they don’t get the answers they want from management, they’ll often reach out to engage with the board,” says Hall, whose prior director experiences include four other publicly traded company boards. “We’ve seen an uptick in board engagement since 2017 over executive compensation, where Archrock shareholders wanted conversations with board members to discuss changes in the methodology of compensation, although this has died down a bit lately.”

When Archrock’s board receives a request for a meeting from an investor

group, Hall says members try to strike a balance between the reasonableness of the request and whether the board has anything of substance to say. “Certainly, large long-term shareholders should be able to occasionally access a board member and ask a question, but if the question veers into Reg FD territory and the director is pressed for an answer, utmost caution and care are advised,” he says.

Asked if he had encountered such thorny questions and how he responded, Hall points to a provision within Reg FD that allows an insider like a board member to disclose material non-public information to a shareholder, as long as the person signs a non-disclosure agreement (NDA) prohibiting the investor from both disclosing the information to others and trading on that information. “When asked a question I can’t answer for disclosure reasons, I may give the investor the opportunity to sign an NDA,” Hall says. “Most investors prefer not to be restricted in their trading,” Hall explains.

Other board members find value in proactively engaging with shareholders. “The boards I sat on for the most part enjoyed the relationships we cultivated with shareholders, particularly the largest institutional investors,” says Warren Phillips, who served on six public company boards in all, among them Global Environmental Technology Company. “On one of the boards, we designated a small group of directors to participate in regular scheduled meetings with the larger shareholder groups in major cities like New York, Chicago or Los Angeles.”

Phillips presently serves on the board at publicly traded CACI International, where he is lead independent director. Recent topics of interest to investors in the multinational professional services provider to several U.S. federal government departments and agencies focus on the ethnicity, age and gender diversity of the board. “These issues were becoming more important, and we felt we had to get out in front of them [with shareholders] as opposed to waiting,” Phillips explains.

Also getting out in front with shareholders is the board at publicly traded Clough Global Opportunities Fund, a closed-end investment fund. “I’ve been urging the board and the CEO and chairman of Clough to speak more to

The Legacy of Reg FD

“Shareholder engagement” is one of those phrases that conjure more than meets the eye, suggesting cozy cocktails and dinners between board members and investors, where discussions are warm and private. As every public company board member knows, the reality is something quite different. Thanks to Reg FD, such meetings are as anxiety-provoking as a teenager’s first date.

Promulgated by the Securities and Exchange Commission in 2000, Reg FD prohibits the selective disclosure of material nonpublic information to shareholders and other investors unless every shareholder and the public at large receives the information at the same time.

“Board members are appropriately nervous when designated to engage with shareholders who have some questions, especially if the investor holds a significant portion of stock in the company,” says attorney Robert Lamm, independent senior advisor with Deloitte’s Center for Board Effectiveness. “They typically don’t want to talk to directors simply to chat.”

Although the SEC has brought few Reg FD cases to court, the possibility of inadvertently saying something to one group of shareholders that a reasonable person would consider important information in making an investment decision has had a chilling effect on board decisions to engage with shareholders, says Dan A. Bailey, a member of the law firm Bailey Cavalieri, who has handled dozens of liability lawsuits against board directors and corporate officers.

“For years, directors and officers have been very reluctant to engage in what is now referred to as shareholder engagement, private meetings with usually larger shareholders,” he explains. “They didn’t want to step over the line and disclose material non-public information to those shareholders, to the exclusion of other shareholders, fearful of tilting the playing field. Over time, though, more companies and boards are sticking their toes in the water.”

CREATING COMFORT

The chilling effect is thawing because of the internal protocols preparing directors in advance of what they can and can’t say, Bailey says. “Most companies and boards put together a defined agenda regarding the topics to be discussed and do things like requiring someone from management to join the board member at the meeting so there is a record of what was said and not said,” he explains. “There’s more comfort now with these private meetings.”

Nevertheless, Bailey expresses caution that boards may become too comfortable. “I’m a bit concerned that as more boards grant a request from shareholders to meet, particularly larger institutional investors and activist inves-

tors, that they will lose focus on the protocols and cross the line into disclosing information they should not be disclosing,” he says.

To forestall this possibility, Lamm says a board must make sure the director designated to speak with shareholders is “investor ready,” which may be even more important than the person’s specific expertise. “A good board has lots of different personalities and areas of expertise,” he says. “If someone is needed to address investor concerns about executive compensation, which they always want to talk about, the natural tendency would be to send in the comp committee chair. But if the person isn’t comfortable and confident in speaking with investors, that’s problematic. In such cases, someone else on the

“Some boards put directors through a sample interview process to equip them to react properly to probing questions.”

—Dan Bailey, Bailey Cavalieri

compensation committee might be more suitable.”

Bailey offers a similarly cautious opinion. “The folks engaged in these meetings on behalf of shareholders are pretty sophisticated people who want to get the information nobody else has yet, which is exactly what directors need to be prepared for,” he says. “They know the rules, but that doesn’t stop them from pushing the envelope. Some boards I know put directors through a sample interview process to equip them to react properly to probing questions.”

He advises the director designated to attend the meeting with shareholders to do little more than listen and understand their concerns. “If they request additional information, the director can respond to some extent in very broad-brush terms but that’s about it,” says Bailey, adding that if the shareholders continue to push for answers, “the director needs to figure out a way to say no as politely as they can.”

It is prudent for the board member to inform investors that any questions the person is unable to answer will be provided after the meeting to management and legal counsel. “In such cases, management should issue a full public disclosure about the information the shareholder is asking for in a press release or proxy statement, and build it into the next 10Q,” Bailey says. “That’s how serious so-called shareholder engagement can be.” —RB



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—Tiffany Olson, Board Member, Telix Pharmaceuticals, Castle Biosciences

institutional investors about our investing strategy, without specifying the companies we might be looking at as short-term or long-term investments,” says Adam Crescenzi, the board’s independent vice chairman. “That’s where we draw the line.”

Tiffany Olson, board member at publicly traded Telix Pharmaceuticals and Castle Biosciences, said both boards sometimes agree to engage with shareholders and sometimes turn down the offer. “We’ve found it appropriate to engage with shareholders on subjects like executive compensation, particularly the choice of equities like restricted stock or options and how they are tied to corporate performance,” she explains. “But when things are moving along just fine and there aren’t any pertinent issues that need discussion, it’s just not worth the effort. Those questions can be addressed at the annual shareholder meeting.”

Hall seems to have a similar opinion. “It’s best to limit direct contact between directors and the investment community,” he says. “When this is infeasible, you need to designate a director to be prepped and ready. Whenever I was specifically asked by an investor to meet with them, which has happened only a couple times, I start out by saying, ‘I’m here to hear you, but that’s it.’”

LISTEN UP

When board members agree to engage with shareholders directly, guardrails must be built and documented to guide compliance with Reg FD. One guardrail is to limit the engagement to no more than one director, whose selection is based on the board committees the person serves. “Once a request for a conference comes in from shareholders, we ask for the topic and related questions and then select which member—like the audit or compensation chair—is the absolute best person to handle the conversation,” Olson says.

The boards Clafin has served pursue a similar approach. “We make sure to choose an experienced board member to meet with shareholders, someone who has spent considerable time interacting with investors and is ready to take their input,” he says. “Shareholders and their analysts can be a really tough audience, and even brutal at times.”

To reduce this possibility, Olson says

the boards she sits on request the agenda before the board member’s initial meeting with investors. “We want to be sure the questions they plan to ask don’t involve restricted topics,” she says. “In the meeting, the board member’s responsibility is to listen to understand versus listen to respond. Afterward, the person lets the rest of the board know what’s going on.”

Another sensible practice is to request the presence of the CEO at a shareholder conference as a “conduit, if the shareholders have a question the CEO needs to answer,” says Olson. Clafin concurs with this approach: “The boards I’ve served make sure someone from management is at the meeting to answer questions we can’t, like, ‘Why was the price on that widget raised 3 percent?’”

At publicly traded Columbia Banking System, the board at the bank holding company has developed a set of pre-engagement shareholder policies. “Should a request come in from a shareholder to speak with the board, the executive board chair will engage in the initial meeting,” says Clint Stein, Columbia’s CEO and a board member. “If, after the meeting, the investor has a desire to speak with an independent director, the executive board chair decides which board member to bring into the meeting, which the executive chair jointly attends.”

WHY SHAREHOLDERS CALL

Many boards have come to accept that in a world where information, some of it inaccurate or misleading, is constantly circulating, shareholders will occasionally get anxious about their holdings. To relieve the tension, they turn to the people entrusted to have their best interests in mind.

“When shareholders are inundated with information, they find it hard to extract needed insights,” says Clafin. “It is not uncommon for investors to request a meeting with the board because the regulatory filings are overly lengthy and dense but brief on detail. If they can’t understand the company’s story in the filings and other reports, it increases the potential for questions.”

To get in front of this possibility, Greg Feldmann, a board member at Carter Bank & Trust, says directors need to regularly monitor shareholder concerns, “which these days can be broadcast outside traditional lines of direct communication. Shareholder

Technologically Speaking

More board members are relying on Generative AI-produced content to prepare for meetings with shareholders and fellow directors.

When Generative AI exploded across the world a little more than a year ago, users were astounded at the potential to automatically create content, making their work more efficient and productive. Board members were among the astonished.

“I chair the nom/gov committee of the board and wanted to do research on a formal retirement program for trustees,” says Adam Crescenzi, independent vice chair at Clough Global Opportunities Fund. “I used GenAI to create an outline on how many other closed-end funds like ours have such retirement programs, trying to get ahead of that question coming from our shareholders.”

ADOPTING AI

Crescenzi is not at liberty to disclose the findings, but he plans to release the outcome in the publicly traded company’s proxy statement this summer. The board member is not alone in giving GenAI an early tryout, given the tool’s remarkable ability to process large sources of unstructured data (based on user prompts) and instantly turn it into content, images and video.

“The two public company boards I’m on now are actively looking at how to use GenAI on a number of fronts, including investor relations,” says Bruce Clafin, who sits on the boards of Ciena Corporation and IDEXX Laboratories. “Obviously, we need to be very careful, making sure the data is available for review and is current, accurate and trustworthy. There are

some terrible cases where people used GenAI and what they thought was accurate information was not the case. But it can be an invaluable aid, if you make sure to do it right.”

Tiffany Olson, a board member at Telix Pharmaceuticals and Castle Biosciences, agrees. “GenAI doesn’t have judgment, assuming it gets the facts straight,” she says. “It can be a very good starting point to quickly gather condensed information to prepare for a meeting with shareholders or the board. Once the underlying data is verified, you use your judgment to select the information you need.”

“Today, we use a lot of third-party benchmarking on the board to assess things like diversity, board size and term length, but I have no doubt we will be using GenAI sooner than later to prepare for meetings,” says Antonio del Valle Perochena, lead director at public company Byline Bancorp.

This use makes sense for another reason—an uptick in shareholder attendance of annual meetings, due in no small part to another recent technological marvel. “We’re finding that having a virtual platform like Zoom engages a much broader group of shareholders,” says Olson. “It’s made it much more efficient and easier to have meaningful meetings without being face-to-face.”

Del Valle Perochena sees virtual annual shareholder meetings as “a huge game changer” for the board. “It’s enabled us to have more and better contact with shareholders, most of whom are choosing to attend virtually.” —RB



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—Gordon T. Hall, Board Member, Archrock

message boards, for instance, are packed with all kinds of chatter, people reacting to [movements in] stock performance or a recent announcement. We review these comments, monitor social media outlets and check Glassdoor for anonymous employee feedback that may create shareholder concerns something unfavorable is brewing.”

To decrease the potential for inaccurate or unfairly negative commentary, the board makes sure the public company has a comprehensive and well-written investor relations webpage. “It’s a rich treasure trove not only of the public filings but other facts and reports informing investors about the bank’s strategy, plans and recent announcements,” he says.

Clafin also touts the value of a company’s investor relations department to keep shareholders well enough informed that they’re less apt to call on the board. “A really

good IR person who is financially savvy, well informed about the company and its markets and close enough to senior management to really know what’s going on will be viewed by investors not as a corporate shill but as a value add,” he says.

He emphasized that investors only ask questions when questions need to be asked. “Board members must appreciate that when shareholders come to them to better understand the company’s direction, the initial reaction to punt the call to senior management may not always be advisable,” Clafin says.

The reason for the outreach may have something to do with management’s lack of transparency, he says. “The board has to make certain that management has to continuously earn the right to be the principal interface with shareholders by being competent, engaged and open.” **CBM**