How long term is your long-term planning?

That's the board's job to know, and directors cannot look to corporate law to supply the appropriate strategic horizon.

BY DOUG RAYMOND

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As readers of this journal know, the case of *Revlon v. MacAndrews & Forbes Holdings*, one of the foundational cases of Delaware corporate law, stands for the proposition that when the sale or breakup of a company is inevitable, the obligations of the board shift from a focus on long-term strategy to instead seeking the best price reasonably available for the stockholders.

But the premise of *Revlon* and of the other sale-of-control cases — that the board ordinarily should focus on long-term strategy — is subject to increasing pressure. Many directors, officers and commentators have made it clear that public corporations exist in a world with frequent analyst reports and the pressures of quarterly reporting as well as the 24/7 news cycle of television, Twitter and other Web-based communications. These all create almost overwhelming pressures to focus on the very short-term horizon of no more than 90 days at the expense of long-term planning that would address years or perhaps even decades.

In recent years this long-running debate has expanded and now includes critics of shareholder activists who are seen to invest in companies with depressed share prices and then agitate to sell these companies in whole or in parts for a relatively quick profit — and at the expense of the long-term value that, say the critics, would otherwise have been created by taking a longer view. In turn, these investors and their supporters, notably Professor Lucian Bebchuk of Harvard, among others, respond with data that they claim shows that their activism actually increases value, measured over any term.

Adding to the noise in this debate is a confusing lack of consensus on who the shareholders actually are for whom this ostensible long-term value is being created (or squandered). In the world of ETFs and hedge funds, as well as the now almost venerable day-traders, a significant percentage of the owners of a public company may own their shares for only a few days, or indeed minutes.

It is almost a metaphysical abstraction to say that the board should be managing the corporation in the interest of all these diverse groups of investors. But, in the boardroom, directors need tangible principles to guide them in their strategic decisions. The legal underpinning for the Delaware corporate governance model and that of most other jurisdictions was adopted largely based on the paradigm of the absentee owner and the faithful managers. Today, this abstract model does not really reflect the markets in which many public corporations operate.

When the corporation's sale or breakup is "inevitable," when it is in "*Revlon* mode," we can pretty easily articulate the board's obligation — to get the highest share price reasonably available. (Though what this means in any particular situation is the stuff of dozens of cases.) The courts, in reviewing these situations, generally make it clear that when the company is not for sale, this price-maximizing standard does not apply. But most boards nonetheless believe that maximizing share value, even outside of a sale context, is one of their primary objectives. With this mandate, doesn't it follow that every public company is for sale every day? And that the only question for the board is whether the current market (or bid) price exceeds the risk-discounted present value of the projected future value that could be realized by following the strategic objectives?

But there is a false assumption here, as it often happens that the market (or bid) price reflects current market and economic conditions more than the internal worth of the business, and most businesses cannot function if they continually must measure their progress by the yardstick of the stock market. In many businesses, long-term goals and values are built at the expense of near-term profits and cash flows. Sacrificing those longer-term plans for better current performance may eventually beggar the company, and leave it with a bleak future.

There is not one right choice for the appropriate horizon for the board's strategic plan, and directors cannot look to corporate law to supply one. The directors should understand the constraints of their business and how far and how fast it can move; they should know what their most important shareholders expect and if there is disagreement, work together to reach a consensus on the appropriate timeline or else try and find new shareholders (or the shareholders might try and find new directors). After all, Rome was not built in a day, and neither can a great company realize its value before its plans are fully implemented. ■

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