

April 2, 2020

Corporate Governance Considerations During the COVID-19 Pandemic

Practical Considerations to Address the Unique Challenges and Circumstances Created by COVID-19

SUMMARY

In light of the COVID-19 pandemic, many companies are confronting unprecedented challenges, including those associated with an increased reliance on technology, implementing social distancing practices with directors, officers, employees, customers and vendors, and managing a comprehensive and informed response to an evolving crisis. In this memorandum we identify practical corporate governance considerations that companies might wish to consider in the midst of the pandemic. Of course, each company needs to assess its own facts and circumstances to develop an appropriate response.

GENERAL CONSIDERATIONS – DUTY OF CARE

Given the widespread nature of the COVID-19 pandemic, some directors may face significant demands on their time and attention as they address emergencies that have arisen in their roles as directors and executives of multiple organizations, while understandably facing concerns for their own and their families' health and safety. Despite these demands, directors must continue to satisfy their fiduciary duties, including the duty of care, which requires them to act reasonably to apprise themselves of available significant information and to participate actively in the board's decision making. To that end, board members should continue to consider all reasonable means to keep themselves adequately informed. For example, information from qualified experts pursuant to Section 141(e) of the Delaware General Corporation Law (the "DGCL") may be particularly helpful with respect to updates on, and responses to, the progression of the COVID-19 crisis and understanding its impact on the company and its business. Importantly, however, directors need not—and generally should not—take on the responsibilities of day-to-day management from the management team they have appointed. In other words, although directors should oversee

SULLIVAN & CROMWELL LLP

management's crisis response efforts, it is not the directors' role to execute on the day-to-day operational aspects of crisis response.

Careful planning on the part of a company's management may also help to ensure that directors are able to meet their fiduciary responsibilities. These measures could include the following:

- providing directors with timely updates and describing how current events, and government actions taken in response to those events, are affecting the company and the likely impact on its future results and strategic plans;
- setting up secure electronic portals by which materials can be easily accessed by directors, certain members of management and outside advisors (as appropriate);
- contacting directors to understand their time commitments and availability, and reassessing meeting schedules to accommodate competing responsibilities, if possible;
- reviewing committee agendas for upcoming meetings to ensure they align with evolving priorities in view of the pandemic;
- reviewing timelines for regulatory filings, earnings releases and other important events and alerting directors to key events that could catalyze pressure on the company;
- staying abreast of media, competitor, employee, analyst, activist, institutional shareholder and proxy advisor assessments of the company's performance, governance and response to the pandemic and being prepared to share relevant data with directors; and/or
- engaging outside experts, including financial advisors, healthcare experts, consultants and lawyers, as needed, to assist with navigating the challenges and issues related to COVID-19.

CONFIDENTIALITY AND CYBERSECURITY

Board members have a fiduciary duty to maintain corporate confidences. A breach of that duty of confidentiality could expose directors to personal liability for breaches of the duty of loyalty for which exculpation and indemnification from the company may not be available (although directors under certain circumstances may have recourse under a D&O policy). In addition, directors may bear "tipper" liability under insider trading laws if they are the source of material non-public information on which a third party subsequently trades. Directors should therefore continue to scrupulously satisfy their confidentiality obligations notwithstanding the disruptions caused by COVID-19. The requirements of social distancing and sheltering in place have forced directors to participate in sensitive discussions and to review corporate information in their own homes or other locations, which may be less secure environments than a company's board room or the directors' normal business offices. In addition, board members may experience challenges associated with using electronic communication and document-sharing tools with which they are unfamiliar. The increased volume of work being performed remotely also presents opportunities for hackers to retool and tailor schemes to target employees and directors who are still becoming accustomed to working remotely.¹

SULLIVAN & CROMWELL LLP

Management can help to mitigate some of these risks for directors by:

- password protecting documents and using available enhanced security features for conference calls and virtual meetings, such as PIN codes;
- ensuring that all participants in virtual meetings are identified and accounted for;
- limiting use of personal email accounts;
- reminding directors to change and upgrade their passwords and to limit access to their accounts and devices;
- encouraging directors to ensure that their personal devices, including internet routers, have current anti-virus protection and only use secured, password-protected internet connections;
- alerting directors to the increased risk of phishing attempts in connection with COVID-19, including that phishing emails may purport to have important notices or updates on the COVID-19 pandemic;
- developing and applying stylistic techniques to ensure that all legitimate communications to directors are readily identifiable as originating from the company rather than a hacker;
- limiting the printing or distribution of hard-copy materials and encouraging shredding of any hard-copy materials that are no longer needed; and/or
- reviewing and updating any confidentiality protocols or information security policies, with a focus on the fact that working remotely is currently the norm rather than an exception.

BOARD COMMUNICATIONS

Before the COVID-19 crisis, shareholders, particularly of Delaware corporations, increasingly pursued demands for statutory inspection of corporate records to gather internal corporate information in aid of a potential future lawsuit. While the scope of records potentially subject to these demands is typically fairly narrow, under Delaware law there can be exceptional cases where the records available can be quite broad.² Such records may include electronic communications exchanged between directors, such as emails, particularly if the corporation is unable to produce “traditional, non-electronic documents sufficient to satisfy the petitioner’s needs.”³ In addition, corporate records and communications may also become subject to discovery in litigation.

It is therefore important to remember that good governance and record-keeping are critical even in more challenging times. The range of corporate records that may be produced in the coming weeks as boards deal in real time with the COVID-19 crisis, including “informal” electronic communications (e.g., recorded communications through platforms such as Zoom or chat applications), risk becoming subject to demands pursuant to laws such as Section 220 of the DGCL and similar statutes in other states.⁴ To that end, the following practical considerations help ensure that corporate formalities are maintained with respect to board communications during this time:

- boards should continue any formal record-keeping processes and corporate formalities that were in place prior to the onset of COVID-19, such as the careful production and review of board agendas and minutes;

SULLIVAN & CROMWELL LLP

- individual directors should avoid discussing company matters among themselves through texts, emails and other electronic means outside of the board meetings and designated corporate communication channels, as those communications could increase the complexities of responding to a demand for inspection, and should instead try to conduct their deliberations by telephone or video conferences where practicable, which has the added benefit of permitting the real-time give and take among the board as a whole which will benefit the board’s deliberative process; and/or
- companies should regularly evaluate whether they are providing adequate technological resources to facilitate director communications, and whether directors are appropriately trained on—and informed about—the resources being made available to them (such resources typically include a secure platform for virtual board meetings and calls).

* * *

ENDNOTES

- ¹ See the S&C publication of March 30, 2020 – [Heightened Cybersecurity Risks Resulting From COVID-19’s Effects on Operations](#).
- ² For example, in *High River Ltd. P’ship v. Occidental Petroleum Corp.*, 2019 WL 6040285 (Del. Ch., 2019), the Delaware Court of Chancery considered a demand by affiliates of Carl Icahn to obtain corporate documents for an anticipated proxy contest to replace certain members of Occidental’s board. Although the court ultimately rejected the shareholders’ demand and confirmed existing law that, for a shareholder to have a proper purpose for a books and records demand, the demand must credibly allege legally actionable wrongdoing by the board rather than merely questionable decisions, the court did not entirely preclude that there could be an occasion when a Delaware court would grant a request seeking documents to aid a proxy fight.
- ³ *KT4 Partners LLC v. Palantir Techns., Inc.*, 203 A.3d 738 (Del. 2019). In another recent case, the Delaware Court of Chancery required the production of emails and text messages from personal accounts and devices despite the challenges associated with the collection of such communications, noting that “the utility of Section 220 as a means of investigation mismanagement would be undermined if the court categorically were to rule out the need to produce communications in these formats.” *Schnatter v. Papa John’s Int’l, Inc.*, 2019 WL 194634, at *16 (Del. Ch., 2019). Although the petitioner in *Schnatter* was making a demand under Section 220(d) of the DGCL, which presents a different standard for the production of books and records, the court’s general discussion with respect to its treatment of emails and text messages from personal accounts and devices may still be informative.
- ⁴ For example, Section 624 of the New York Business Corporation Law and Section 1601 of the California General Corporation Law require New York and California corporations, respectively, to produce and keep corporate books and records, including minutes from board proceedings.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Werner F. Ahlers	+1-212-558-1623	ahlersw@sullcrom.com
Francis J. Aquila	+1-212-558-4048	aquilaf@sullcrom.com
Nicolas Bourtin	+1-212-558-3920	bourtinn@sullcrom.com
Catherine M. Clarkin	+1-212-558-4175	clarkinc@sullcrom.com
Audra D. Cohen	+1-212-558-3275	cohenad@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Scott B. Crofton	+1-212-558-4682	croftons@sullcrom.com
Robert W. Downes	+1-212-558-4312	downesr@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
John Evangelakos	+1-212-558-4260	evangelakosj@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
Brian T. Frawley	+1-212-558-4983	frawleyb@sullcrom.com
Sergio J. Galvis	+1-212-558-4740	galviss@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Matthew B. Goodman	+1-212-558-4995	goodmanm@sullcrom.com
Brian E. Hamilton	+1-212-558-4801	hamiltonb@sullcrom.com
Matthew G. Hurd	+1-212-558-3122	hurdm@sullcrom.com
Stephen M. Kotrans	+1-212-558-4963	kotrans@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Scott D. Miller	+1-212-558-3109	millersc@sullcrom.com
Keith A. Pagnani	+1-212-558-4397	pagnanik@sullcrom.com
David M.J. Rein	+1-212-558-3035	reind@sullcrom.com

SULLIVAN & CROMWELL LLP

Alison S. Ressler	+1-212-558-3098	resslera@sullcrom.com
George J. Sampas	+1-212-558-4945	sampasg@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyerM@sullcrom.com
Alan J. Sinsheimer	+1-212-558-3738	sinsheimera@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Krishna Veeraraghavan	+1-212-558-7931	veeraraghavank@sullcrom.com
Benjamin H. Weiner	+1-212-558-7861	weinerb@sullcrom.com

Washington, D.C.

Robert S. Risoleo	+1-202-956-7510	risoleor@sullcrom.com
-------------------	-----------------	--

Los Angeles

Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Rita-Anne O'Neill	+1-310-712-6698	oneillr@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com

Palo Alto

Scott D. Miller	+1-650-461-5620	millerSc@sullcrom.com
Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com

London

John Horsfield-Bradbury	+44-20-7959-8491	horsfieldbradburyj@sullcrom.com
Jeremy B. Kutner	+44-20-7959-8484	kutnerj@sullcrom.com
Ben Perry	+44-20-7959-8477	perryb@sullcrom.com
Richard A. Pollack	+44-20-7959-8404	pollackr@sullcrom.com
Evan S. Simpson	+44-20-7959-8426	simpsonsE@sullcrom.com

Paris

Olivier de Vilmorin	+33-1-7304-5895	devilmorino@sullcrom.com
---------------------	-----------------	--

Frankfurt

Carsten Berrar	+49-69-4272-5506	berrarc@sullcrom.com
Krystian Czerniecki	+49-69-4272-5525	czernieckik@sullcrom.com
York Schnorbus	+49-69-4272-55-17	schnorbusy@sullcrom.com

Brussels

Michael Rosenthal	+32-2896-8001	rosenthalm@sullcrom.com
-------------------	---------------	--

Melbourne

Waldo D. Jones Jr.	+61-3-9635-1508	jonesw@sullcrom.com
--------------------	-----------------	--

Sydney

Waldo D. Jones Jr.	+61-2-8227-6702	jonesw@sullcrom.com
--------------------	-----------------	--

Tokyo

Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com
--------------	-----------------	--

SULLIVAN & CROMWELL LLP

Hong Kong		
Garth W. Bray	+852-2826-8691	brayg@sullcrom.com
Kay Ian Ng	+852-2826-8601	ngki@sullcrom.com

Beijing		
Gwen Wong	+86-10-5923-5967	wonggw@sullcrom.com
