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Business Continuity Planning Following COVID-19

Considerations for U.S. Public Company Directors

SUMMARY

As U.S. public companies continue to navigate the short-term effects of COVID-19, many boards of directors are also discussing how to respond to the longer-term impacts of the pandemic. This memorandum highlights key issues that many directors are discussing, including:

- continuity of human capital, including management and director succession planning, talent development and facility reopening protocols;
- compliance and technology infrastructure, including data protection and internal controls;
- providing guidance to investors;
- supply chain management; and
- liquidity and capital allocation considerations.

BOARD'S DUTY OF OVERSIGHT

Directors are responsible for overseeing their company's operations.¹ Although "[under Delaware] law, director liability based on the duty of oversight is possibly the most difficult theory...upon which a plaintiff might hope to win a judgment,"² Delaware courts also "[recognize] the protean nature of ideal corporate governance practices."³ For many public companies, the pandemic has brought longer-term risks into sharper focus, and boards are increasingly developing and building on best practices relating to the oversight of business continuity planning in response to those risks.

CONTINUITY OF HUMAN CAPITAL

Identifying Successors. Senior executives of public companies like so many others have become ill with COVID-19 during the pandemic. In the immediate aftermath of those illnesses, the affected issuers had to

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consider whether and how to disclose the executives' illnesses.⁴ This experience may lead some boards to review the management succession risks presented by global health crises and force majeure events more generally. These succession plans may identify interim chains of command and potential successors, and delineate the responsibilities that will be delegated to other officers in the event of a manager's temporary absence. Some issuers are taking these plans beyond the c-suite to include other critical roles, such as key technology infrastructure-related positions.

Board Succession. In addition to management succession risks, the pandemic has also underscored similar risks concerning board leadership succession. Some boards have engaged in scenario planning to contemplate the sudden illness of a board chair, a lead independent director or a committee chair, and are working to identify current directors who can succeed to existing board leadership positions (e.g., audit committee chair) if the need arises and enhancing the succession process with respect to identifying potential replacement board members. Companies may also consider whether board compensation plans should be adjusted in light of the added time commitment directors have expended during the pandemic. Finally, institutional investors and proxy advisory firms continue to scrutinize potential "overboarding" concerns for director nominees, especially in light of the added time commitment, which may factor into board succession considerations.

Developing Talent. As boards review their succession plans with senior management, some companies are finding that their pipeline of up-and-coming talent needs to be refreshed or that the company is in need of managers with different skill sets than it historically sought. In particular, versatile leaders who have the skills and experience to step into multiple different roles as needed in a crisis may be in higher demand in this environment. Developing managers with this kind of versatility internally may require companies to circulate up-and-coming leaders through multiple functional departments – a process that only occasionally evolves organically and more frequently requires planning and dialog with the individuals concerned as well as their supervisors. In order to identify versatile leaders externally, companies may need to cast a wider net and consider whether to reformulate existing job descriptions. Boards generally do not get involved in hiring decisions below the c-suite level, but talent development is a regular board topic and it is reasonable for directors to ask whether management is considering implementing any modifications to its historical approach to take into account learnings from the pandemic.

Bringing Management Back to the Office. Some management succession plans take into consideration best practices and recommendations regarding whether and how to bring senior management teams back into the office. For example, in some cases issuers may contemplate phased reentries, with select members of the management team expected to continue to work remotely over a longer period so as to de-densify the c-suite and limit the potential for an infection to affect the entire senior management team.⁵ Again, boards generally do not get involved in planning the details of these kinds of transitions, but it is reasonable for directors to ask the CEO or head of human resources to keep the board informed of key

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aspects of the company's "return to work" plans, especially to the extent those plans could have public relations, investor relations or earnings per share implications.

Personnel and Facility Management. Separate from the question of how to bring management teams back together, many boards are involved in discussions with management concerning how the company will manage personnel and facilities to ensure the safety of their employees and customers, both during and after the pandemic, as well as the overall cost impact of those protocols. These discussions may include regular reporting from management on the conditions of factories (if applicable) and other facilities – specifically as they relate to the pandemic – as well as numerous human resources issues such as the extent and cost of healthcare and insurance coverage for employees, identifying essential workers, implementing safety protocols (e.g., facility sanitation and social distancing compliance) and revisiting business travel policies. Some companies have already announced new permanent standards for flexible or remote working arrangements. Many of these decisions have potential legal, financial and reputational risks. In this regard, directors of Delaware corporations are entitled to consult with and rely upon the information provided by management, consultants and other experts. In addition, some companies are proactively sharing with each other their proposed plans and best practices for managing personnel and facilities in light of the pandemic. Companies that are considering exchanging such information with competitors will need to be mindful of relevant restrictions under the U.S. antitrust laws, including with respect to the sharing of competitively sensitive information.

COMPLIANCE AND TECHNOLOGY INFRASTRUCTURE

Compliance Oversight. The pandemic has heightened compliance risks for many companies due to the unprecedented strains placed on companies, their management and boards, and the changing legal and regulatory landscape. Among other stressors, stay-at-home orders, social distancing restrictions and work-from-home policies have introduced manifold new compliance considerations for companies. Unless otherwise indicated, domestic and international regulators have continued to enforce their rules, run exams and otherwise continue their business-as-usual activities. To maintain the integrity of their compliance programs in this environment, some companies are increasingly relying on technological solutions to monitor compliance. Management can obtain a wealth of data from these monitoring programs and is typically on the front lines in addressing instances of non-compliance and remediation. However, directors continue to serve an important function in setting the "tone at the top" and fostering a culture of compliance.

Data Protection. An area of compliance risk that has come into particular focus during the pandemic is data privacy. The risk of data breaches has increased as employees, management and boards have transitioned to remote work. Many regulators have signaled that data protection regulations will not be eased across the board during the pandemic, and, as such, companies should continue to review their cybersecurity and data protection compliance profile.

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Internal Controls. To ensure continued effectiveness of internal control functions during and after the pandemic, many audit committee members have had occasion to consider how they communicate with internal finance professionals, external auditors and other advisors their company uses to assist in assessment of internal controls. There is no “one size fits all” approach to maintaining open communications in this environment. In the event companies are concerned about meeting disclosure deadlines as a result of the pandemic, they can consider utilizing SEC extensions and/or hardship exceptions and engaging with the SEC.⁶

PROVIDING GUIDANCE TO INVESTORS

Even well before the pandemic, the market was overflowing with commentary about the challenges issuers face in trying to deliver guidance on a quarterly basis. The pandemic has only heightened these challenges by disrupting many issuers’ operations and markets to such a degree that they have retracted prior guidance and been unable to construct reliable financial projections. As a result, some issuers have focused primarily on providing disclosure regarding the current impacts of the pandemic.⁷ Over the medium to longer term, boards and management teams may need to discuss whether they want to resume their historical approach to giving quarterly guidance. While some investors are likely to be critical of an outright cessation of guidance, the pandemic may refine both investors’ and issuers’ views regarding which metrics issuers should use to guide the market.

SUPPLY CHAIN MANAGEMENT

The pandemic has highlighted new and existing vulnerabilities in many companies’ supply chains. For example, some industries as a whole have discovered that their heavy reliance on Chinese suppliers worked to their detriment when China was one of the first jurisdictions to experience shut-downs on account of the pandemic. While cost will continue to be an important consideration in procurement decisions, to ensure continuity of supply some companies may also review concentrations in their existing supply chains and the effects of “just in time” delivery requirements. Management teams may work to develop supply disruption contingency plans. Boards may wish to have the opportunity to discuss with management the pros and cons of diversifying supply chains and holding higher inventories of key inputs.

LIQUIDITY CONSIDERATIONS

Without question, the pandemic has put a strain on many companies’ liquidity positions. To hedge against potential liquidity crunches, many companies have drawn on their revolvers and amended their credit facilities to shore up their cash positions. Even as the immediate crisis eases, it is possible that the pandemic will cause some companies to add to their annual Board processes a review of the company’s available liquidity and compliance with financial metrics rules and policies. Boards may wish to consider these issues as part of their annual strategic planning discussions.

ENDNOTES

- 1 *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996)
- 2 *Marchand v. Barnhill et al.*, 212 A.2d 805 (Del. 2019)
- 3 *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64–66 (Del. 2006)
- 4 See the S&C publication of March 20, 2020 – [Senior Executive Illness Due to COVID-19](#).
- 5 See the S&C publication of April 23, 2020 – [COVID-19 Response – Return-to-Work Considerations for Employers](#).
- 6 See the S&C publication of March 30, 2020 – [SEC Issues COVID-19 Disclosure Guidance and Extends Conditional Relief from Reporting Requirements](#); the S&C publication of April 9, 2020 – [SEC Staff Updates COVID-19 Shareholder Meeting Guidance](#); and the S&C publication of April 9, 2020 – [Impact of COVID-19 on Quarterly Reporting; New Statement from SEC Chairman and Director of Division of Corporation Finance](#).
- 7 See the S&C publication of April 6, 2020 – [COVID-19 Risk Factor and Other Disclosure Considerations for Banking Institutions](#).

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