

Best Board Practices in a Pandemic Era

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Companies continue to wrestle with the impact of the COVID-19 pandemic, including transitioning to a virtual environment, determining whether to reopen physical operations, resolving disruptions of supply channels, pivoting business strategies, and managing employee safety and wellness concerns. It is unclear when and how businesses or the economy will emerge from the pandemic, and whether business as we know it will ever look the same. During uncertain times such as these, companies and their management teams need the guidance and experience that a board of directors provides. Private company board members can be effective and fulfil their duties to the company and its shareholders in this unprecedented and volatile environment if they adhere to the following practices.

HOLD BOARD MEETINGS AS NEEDED

Given the quickly evolving environment and constant legal and regulatory developments, in order to properly help the company navigate this crisis, board members may need to meet more frequently. If there is no regularly scheduled board meeting coming up, a special meeting of the board of directors should be called.

In order to mitigate health risks, if allowed, companies should offer board members the opportunity to participate in board meetings virtually. A company should review its articles of incorporation and bylaws to determine if there are restrictions, procedures or protocols in place regarding virtual meetings. If the articles and bylaws are silent as to hosting virtual meetings, a company should look to state law for guidance. Under California law, unless otherwise provided for in a company's articles or bylaws, a board meeting may be conducted through use of conference telephone, electronic video screen communication, or electronic transmission, as long as all participants are able to hear one another, communicate, and participate. Under Delaware law, unless otherwise restricted by a company's certificate of incorporation or bylaws, a board may meet by conference telephone or other communications equipment as long as all participants can hear each other.

At board meetings, the board and the company should establish the appropriate level of, and proper channels for, communication with management. Management should keep the board properly informed and involved, and the board should be able to promptly and candidly converse with management. This is particularly important as developments are unfolding rapidly and decisions may need to be made promptly. At the same time, the board should avoid placing unnecessary reporting or meeting burdens on the management team that disrupt business operations.

STAY APPRISED OF CURRENT DEVELOPMENTS

COVID-19 developments are occurring at the federal, state, and local levels every day. Government stimulus and economic relief opportunities are rapidly changing. Laws governing treatment of employees are evolving. Government orders regarding whether and how businesses may resume operations are issued daily. It is nearly impossible for a company's management team to be on top of every new development as it unfolds. For this reason, board members now more than ever have an opportunity to be a resource. Up-to-date board members can raise issues or offer insight on the developments that the company might not otherwise have recognized. Board members bring varying skill sets and experiences to the table, each of which might be vital with respect to different developments. This way, the company will stay properly informed and be able to promptly take action when the need arises.



IMPLEMENT A COVID-19 REPORTING AND OVERSIGHT SYSTEM

Board members are charged with protecting the interests of their company and acting in the best interest of the shareholders. In Delaware and many other jurisdictions, the core fiduciary duties of board members are the duties of care—requiring board members to be fully and adequately informed and to act with care when making decisions—and loyalty—requiring board members to act and make decisions in the best interest of the company and its shareholders (known as “stockholders” in Delaware). As part of their duty of loyalty, particularly in times of uncertainty, board members should be keenly aware of their duty to stay informed and oversee the company's risk exposure. This includes making a good faith effort to implement and monitor a reporting and oversight system, to ensure the board is informed of and able to react to health and safety concerns.

Given the heightened exposure and increased health and safety compliance requirements due to the current pandemic, boards should confirm that companies have a COVID-19 oversight and reporting system. This system should ensure that the board stays informed of issues in a timely manner. The board, or an appointed committee, should use the system to actively monitor for potential risks and, if necessary, take or recommend preventative measures in a timely manner.

GUIDE POST-PANDEMIC STRATEGIES

Management teams are dealing with the time-consuming, day-to-day impacts of the crisis. With so much going on, management may not have the bandwidth to focus on the company's long-term, post-crisis strategy. Board members, on the other hand, have a unique vantage point within the company, and can focus on the company's long-term objectives. They rely on their experience and industry knowledge to provide future-focused guidance.

At this time, the board's future considerations must include crisis response. For example, the board may need to mitigate business risk and determine how to weather a sustained economic downturn. This might require reviewing the company's financial preparedness and liquidity and solvency risk, considering ways the company can diversify its finances, supply channels, or operations, and exploring opportunities for consolidation.

Depending on the health of the company, planning for a company's future should also include considering opportunities to redefine the company, enabling it to thrive in a post-pandemic environment. For example, board members can consider opportunities for partnerships and evaluate strategic mergers or acquisitions. They can help the company reinvent itself in preparation of what may be a vastly new “normal,” including through product expansion, market development, talent acquisition, and updating information technology and marketing strategies. If the board helps the company come up with a post-pandemic plan, the company will be better prepared to move forward with its vision as it emerges from the crisis.

Board members have a critical role to play in helping their companies navigate through this crisis. Now is the time for board members to stay acutely aware of the company's needs and step up as leaders.



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