WINSTON & STRAWN LLP

BLOG

Key Considerations for Boards of Directors and Management in the Wake of the COVID-19 Pandemic

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With the COVID-19 pandemic rapidly evolving and ever-changing, staying well-informed about corporate developments is vital for board effectiveness. The pandemic has caused the need for urgent yet thoughtful responses by corporations through their executive officers and boards of directors. While management remains responsible for a corporation's day-to-day response to COVID-19, the board's oversight role necessitates its involvement in monitoring and assessing management's actions and providing additional input where needed. Below is a chart summarizing potential issues management and boards of directors may face, as well as some considerations and proposed solutions for addressing such issues.

ALL COMPANIES	
ISSUE	**CONSIDERATIONS**
Health and safety concerns may arise as employees (or family members of employees) become ill and/or certain company operations close.	• Boards should remain in close communication with management regarding the impact of new developments related to COVID-19 on the company. • Management should set the tone at the top through communications and socially responsible policies. • Boards and management should work in tandem to devise effective mitigation plans to address any economic impacts resulting from employee absences due to illness and/or the potential closures of certain operations.

ALL COMPANIES	
Potential disruptions related to employees working remotely or employees who are unable to work may arise as the COVID-19 pandemic limits contact with others.	• Management should continually assess minimum required staffing levels. • Management should consider what remote work technology will be required to maintain operations within this new framework of social distancing. • Boards should review business continuity plans and discuss any relevant contingencies with management. • With the help of internal or external health experts, consider implementing specific policies relating to travel, sick days, work-from-home, large meetings and gatherings, and increased sanitation measures.
Ongoing measures taken to control the pandemic may result in disruptions in supply chain or production.	• Boards and management should review any risks associated with interruptions in operations and contemplate how to protect against such risks. • Management should assess the availability of alternate supply sources. • Review and assess any foreseeable issues with fulfilment of contractual obligations by analyzing relevant provisions in customer contracts (e.g., events of default, termination, and force majeure). • Management should consider whether company insurance policies cover the effects of COVID-19.

ALL COMPANIES	
With disruptions to business operations becoming more and more likely, companies should consider any financial impacts and liquidity issues that may follow.	• Management should review potential financial impacts of COVID-19, taking into consideration the impact of the volatile financial markets. • Management should consider and brief the board on company indebtedness, including bank and bond financings, lines of credit, availability of revolvers, key covenant terms, and, in conjunction with that briefing, provide information regarding the company's near-term liquidity needs. • If necessary, companies may need to draw down on their outstanding commitments in order to address the financial burdens imposed by COVID-19. We are beginning to see companies drawing down on their revolvers to preserve liquidity and we expect the trend to continue. • Management should consider the need to seek additional financing or amend any existing debt arrangements. • Companies may want to evaluate any current or proposed dividend and buyback policy and revise as necessary to preserve cash.
With the widespread reach of COVID-19, it is likely that some companies will experience key employees being exposed.	• If not already in place, the board should ensure that an up-to-date emergency succession plan exists that identifies a person who can step in immediately as interim CEO in the event the CEO contracts COVID-19. • The company should consider implementing similar plans for other key executives. • Management should prepare template communications to notify employees and other relevant parties of any employee exposure to COVID-19. • Management of public companies should consider whether a Form 8-K filing is required for material developments such as if the CEO or other key person or a significant portion of the workforce contracts COVID-19.
In the current environment, large incentive payouts to company executives may not be well received by company employees or the greater public.	• Consider reworking incentive plans or delaying setting incentive plan goals until the current uncertainty has subsided.

ALL COMPANIES	
If contained, COVID-19 may bring long-lasting behavioral and societal changes.	• Contemplate any lasting effects that may result from COVID-19 on employee and consumer behavior and expectations. • Continually review and assess operation and production plans, strategic opportunities, and business continuity plans to ensure that they are adaptable to any such changes.

PUBLIC COMPANIES

ISSUE	CONSIDERATIONS
Compliance with public reporting and disclosure requirements may become more difficult as many items related to COVID-19 remain uncertain.	The SEC has acknowledged that it is challenging to provide accurate information about the impact COVID-19 could have on future operations. Disclosure required of public companies will depend on various factors, including where the company primarily operates, the company's industry (e.g., airlines, hospitality, and other highly affected industries), and the extent to which any financial or business conditions of the company have materially altered due to COVID-19. Companies should be mindful of Regulation FD requirements and avoid selective disclosure concerns, particularly if sharing information related to the impact of COVID-19 with customers and other stakeholders. • **Risk Factor Disclosure**: Many companies have added general risk factors to their disclosure regarding the uncertain impact of COVID-19. As companies begin to identify particular risks, they should consider revising their disclosure to communicate particular risks to their business. Some examples include risk factors related to disruptions to business regarding travel restrictions and lock-downs, uncertainty regarding macroeconomic conditions, credit and liquidity risks, vulnerabilities caused by the outbreak that may increase the risk of a cybersecurity breach, and inventory write-downs and impairment losses. • **MD&A**: In line with the actual or likely impact of the COVID-19 pandemic on the company's financial condition, results of operations, and liquidity, each company must consider whether such impact is a "known trend or uncertainty" requiring disclosure in the MD&A. • **Earnings Releases**: If a company knows that outstanding outlook is no longer accurate, management and the board should consider whether to (1) downgrade existing guidance if the impact

	is known or (2) withdraw existing guidance as a result of the uncertainty of the impact of COVID-19. • **Proxy Statements**: Companies may want to consider expanding discussion of board oversight to COVID-19-related risks where material to the business and whether to add any language regarding a potential virtual meeting. See our blog post regarding virtual annual meetings for additional information on precedent disclosure. • **Forward-Looking Statements**: Companies should review and revise forward-looking statement language to ensure there is adequate protection for any statements made related to impacts of COVID-19. On March 4, 2020, the SEC released an order granting an additional 45 days to meet Exchange Act reporting obligations due between March 1 and April 30, 2020 in connection with any filing delays due to COVID-19. Please see the full order for additional details.
In connection with material non-public information regarding the impacts of COVID-19, there may be insider trading implications if insiders trade in a company's securities at this time.	• Management should closely monitor and consider additional restrictions on trading of company securities by insiders who may have access to material non-public information related to COVID-19 impacts (e.g., by refreshing insider trading training, imposing additional blackout periods, or enhancing pre-clearance procedures). • On March 4, 2020, the SEC issued a press release that stated if a company "become[s] aware of a risk related to the coronavirus that would be material to its investors, it should refrain from engaging in securities transactions with the public and to take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from initiating such transactions until investors have been appropriately informed about the risk." Please see the full press release for additional details.

PUBLIC COMPANIES	
Boards and management should be prepared to address any regulations or restrictions on in-person annual shareholder meetings.	• Public companies considering changing annual meeting logistics, including switching from an in-person meeting to a virtual or hybrid meeting, must review applicable requirements under state law, exchange rules, and the company's organizational documents. See our blog post regarding virtual annual meetings for additional information on considerations regarding virtual annual meetings. • If a company wishes to make changes to meeting logistics, it must should review and prepare to comply with the recent guidance issued by the SEC.
With companies experiencing enhanced vulnerability due to impacts from COVID-19, including by way of reduced market capitalization, it is possible there may be increased activism and takeover attempts.	• Update or activate defense preparation plans, in anticipation of any takeover attempts. This may include reviewing structural defenses and/or developing communication plans.

For additional information regarding any of the above items, or with respect to any questions relating to a specific company or situation, please contact your Winston relationship attorney.

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