

# Remaining Operational: Re-Positioning Business During the COVID-19 Pandemic

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As the economic shutdown from the COVID-19 pandemic becomes, at least for the time being, the new normal, organizations are faced with the challenge of adapting to these vastly altered conditions. To help identify the strategic issues that will define business during and after the pandemic, Winston & Strawn's Mike Blankenship and Eric Johnson partnered with Bloomberg Law to discuss the items that should be on the agenda of boards and management. The highlights of the presentation include:

**The emphasis on stakeholders will continue.** The COVID-19 pandemic has brought into view the extent to which businesses are dependent on the communities in which they function. This perspective will continue after the crisis subsides. The actions boards take today, while in survival mode, must stand up to public scrutiny tomorrow. When making tough decisions, boards should be guided by a focus on safeguarding reputation and staying "on brand."

**Governance quality is put on display.** The COVID-19 pandemic requires boards to excel in all the fundamental elements of governance. Its communications need to be clear, reliable and frequent. The counsel it gives to management must be sound and objective. Oversight of everything from disclosures in documents filed with the SEC to execution of business continuity plans, must be thorough. Whatever weaknesses that surface should be addressed with sustainable changes to procedures and policies.

**Expand succession planning outside the C-suite.** Succession planning for top management has always been a critical board concern, but the COVID-19 pandemic shows the importance of a deep bench throughout the organization. The board needs to be interacting with the organization's HR chief so that there are backups in place if key front-line managers are out for extended periods.

**Rethink incentives.** The need to strengthen liquidity has organizations looking for non-cash incentives such as equity grants or increased benefits. Some of these solutions may turn out to be viable alternatives even after the crisis has subsided.

**Assess your commercial capabilities.** The COVID-19 pandemic has shone a bright light on all aspects of resiliency—remote working capabilities, operational redundancies and pivoting speed. While executing on these requirements, boards and management should also be identifying areas for improvement and planning short- and long-term remediations.

**Supply chain risk isn't a question of foreign vs. domestic.** The impact of the COVID-19 pandemic on far-flung supply chains has caused many organizations to look to domestic providers. But the virus doesn't recognize international boundaries, and domestic suppliers are just as vulnerable as those abroad. Instead, organizations will have to take a hard look at how much margin of error they have in their inventory control and decide how much profit they are willing to forego in exchange for some padding.

**Pandemic risk is here to stay.** The pandemic provides a stark reminder that globalization isn't just about the movement of goods—it's also about the movement of people. As a result, vulnerability to pandemics will continue. Boards and management need to include the possibility of pandemics in everything from risk management to contract forms.

**Take a less rosy view of capital structure.** The suddenness and magnitude of the economic pullback has exposed the extent to which companies have routinely based their business plans on best-case scenarios. Going forward, the priority needs to be on resiliency--starting with a more critical view of leverage and carrying costs.

**Be ready for when deals resume.** The drive to hoard cash and the difficulty of establishing valuations has stalled deal flow for the foreseeable future. But when deals do resume, volume will be driven by pent-up demand and the reshuffling of assets among firms. Due diligence best practices will be recalibrated to include a much greater focus on resiliency, from supply chains to contracts. Companies need to be prepared to both exert that level of scrutiny and to be subjected to it.

**Contingency clauses go under the microscope.** The COVID-19 pandemic is forcing a complete rethinking of what constitutes a force majeure or a materially adverse event, both in contracts and insurance. Beyond the legal wrangling currently underway, much greater attention will be paid to how contingency clauses are written, not only regarding the inclusion of pandemics and associated events like stay-at-home orders, but for threats that—for now—are still theoretical. Operating in multiple jurisdictions significantly complicates this task.

**Understand your counterparties.** The disruptions caused by the economic slowdown are severely testing commercial agreements made in better times. While some conflicts will need to be litigated, for a great many, honest conversation will be a more productive path. Before filing papers, consider picking up the phone.

**In crisis there is opportunity.** The \$2 trillion CARES Act is sufficiently broad in scope that it is likely to affect not just a given company, but the other entities in its web of relationships. Take time to understand the Act's implications for the firms with which you do business, and what sort of opportunity that might present for you.

Winston & Strawn's COVID-19 Task Force brings a comprehensive approach to the complex legal and strategic challenges presented by the pandemic. Please visit our [COVID-19 Resources page](#) for more information and to contact our [Task Force members](#).

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